Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

ELMER A. HAWKINS,

Petitioner,

v.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

J. MYERS MORTON
Counsel of Record
MORTON & MORTON, PLLC
ONE MORTON PLACE
1518 N. BROADWAY
KNOXVILLE, TENNESSEE 37917
(865) 523-2000
myersmorton@comcast.net

Counsel for Petitioner
Elmer A. Hawkins

March 5, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800 890.5001

QUESTION PRESENTED FOR REVIEW

Is this petitioning Veteran being denied his rights by the Secretary of Veterans Affairs by a device of never deciding his claim by keeping his claim in procedural limbo for over 19 years?

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Federal Circuit.

The Petitioner here and appellant below is a combat injured and decorated Vietnam veteran, Elmer A. Hawkins.

The Respondent here and appellee below is Eric K. Shinseki, the United States Secretary of Veterans Affairs.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 14.1(b) and 29.6, Petitioner states as follows:

He is an individual; therefore, there are no parent corporations or publicly held companies owning 10% or more of any corporate stock.

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OPINIONS BELOW

The majority opinion and dissenting opinion of the United States Court of Appeals for the Federal Circuit (hereafter "Federal Circuit") is not reported and is reprinted in the Appendix to this Petition as Appendix A Page 1a (hereafter "Pet.App.__ __").

The United States Court of Appeals for Veterans Claims (hereafter "Veterans Court") opinion from which the appeal to the Federal Circuit originated is not reported, but is reprinted at Pet.App. B 6a. The Court of Appeals for Veterans Claims opinion denying a panel decision is reprinted at Pet.App. C 13a.

BASIS OF JURISDICTION

Pursuant to Rule 14.1(e), the Federal Circuit issued its decision December 7, 2009. There was no motion for rehearing or review filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

A copy of this request for certiorari has been served via commercial carrier addressed as follows: Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N. W., Washington, DC 20530-0001.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a combat, Vietnam veteran who has applied for compensation for several maladies caused by exposure to Agent Orange pursuant to 38 U.S.C. § 1110.

Article I, Section 1, of the Constitution of the United States provides:

> "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Article II, Section 1, of the Constitution of the United States provides:

> "The executive Power shall be vested in a President of the United States of America..."

38 U.S.C. § 1110 is entitled "Basic entitlement" and states:

> "For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter [38 USCS §§ 1110 et seq.], but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs."

STATEMENT OF THE CASE

A. Factual Background

Petitioner is a combat injured Vietnam veteran, who was decorated with the purple heart, among other medals, and was exposed repeatedly to Agent Orange. Since his return from Vietnam, petitioner's condition has been and continues to be terribly disabling. He has tumors that quickly grow all over and in his body from, among other places, between knee, hip, jaw, elbow, finger and wrist joints, on glands through his body, on his penis, under his skin, on his abdomen, neck, chin, forehead, jaw, chest, neck, buttock and arms to on his larynx. The tumors are painful and disabling. The tumors impede his ability to walk, talk, sleep, stand, sit, eat, breath, urinate and make him impotent. Once too painful, the tumors are required to be removed surgically. (Pet.App. T 112a)

Both Dr Velado and Dr. Bash have determined Petitioner's medical problems described above are due to exposure to Agent Orange while in Vietnam. (Pet.App. N 79a; O 85a; P 89a; Q 95a)

For instance, Dr. Bash opines:

> "...the most likely etiology for this patient's diffuse and varied skin tumors is his exposure to Agent Orange for the following reasons..." (Pet.App. S 108a)

B. Adjudicatory Proceedings

Petitioner filed his claim for service connection for his maladies caused by Agent Orange on October 22, 1990. (Pet.App. M 78a)

This claim has been pending, and there has been no final decision on this claim for approximately 19 years.

Had there been a ***legitimate*** reason to deny the claim, Respondent would have concluded this matter many years ago. The fact the Respondent has kept Petitioner's claim in administrative limbo for 19 years demonstrates his entitlement to compensation.

To date, this claim has been before Veterans Court at least seven (7) times, in the following chronologic order.

96-0192 Elmer A. Hawkins 3/11/1996

Pursuant to a joint motion, the Veterans Court remanded this veteran's claim by Order dated October 1, 1996. (Pet.App. D 15a)

98-1383 Elmer A. Hawkins 8/3/1998

On or about August 3, 1998, Petitioner filed his first Petition for Extraordinary Relief with the Veterans Court seeking specific relief. (Pet.App. E 17a)

The Veterans Court, on September 29, 1998, construed this first Petition as seeking 8 items:

> (1) "...return tissue samples and slides..." (2) "...provide the petitioner with access to two treatises..." (3) '[a]bide by the law of the case' by articulating the reasons for denying service connection..." (4) "...by assisting the petitioner in developing his claim, which would include obtaining a dermatological examination with tissue samples..." (5) "...determine and advise the petitioner of the status of his claim..." (6) "...the Secretary has failed to comply with `the law of the case' because there have been no attempts by [the Secretary] to obtain additional evidence from Dr. Velado..." (7) "...Essentially he asserts that, under the law of the case, VA should be directed to schedule an appointment for removal of the tumors earlier than December 1998..." and (8) "...He asserts that he is for the first time' requesting the Secretary to provide or make available the National Academy of Sciences studies...that were referred to in a Supplemental Statement of the Case..."

See the Veterans Court's order dated September 29, 1998. (Pet.App. E 17a)

Only after this first Petition was filed and the court entered Orders did the Secretary take any action. Mainly, as a result of the Secretary's belated actions, the Veterans Court, on or about September 29, 1998, dismissed this first Petition except for one item:

> "...ORDERED, with respect to item 2, that, within 30 days after the date of this order, the Secretary either (1) submit a legal memorandum addressing whether the Court, based upon a violation of the duty to assist or

> fair process, should issue a writ directing the Secretary to make reasonable attempts to obtain relevant portions of the requested treatises or (2) provide the Court with a statement as to what steps the Secretary has taken to obtain relevant portions of the treatises or to provide the petitioner with information regarding the location of such treatises. It is further
>
> ORDERED, with respect to item 4, that, within 30 days after the date of this order, the Secretary advise the Court as to whether tissue samples have been obtained and, if not, when such tissue samples will be obtained..."

See the court's Order dated September 29, 1998. (Pet.App. E 17a)

Again, ***only after*** the Veterans Court's Order did the Secretary act.

On or about December 8, 1998, the Veterans Court ordered the first Petition For Extraordinary Relief as it related to the Secretary providing medical treatises to Petitioner was denied and:

> "...ORDERED that the Secretary, within 30 days after the date of this order, respond to the petitioner's assertion that he is entitled to a writ because tissue samples have not been obtained. *See Stegall v. West*, 11 Vet.App. 268, 271 (1998) ("[A] remand by this Court or the Board confers on the veteran or other claimant, as a matter of law, the right to compliance with the remand orders...[and] imposes upon the Secretary of Veterans Affairs a concomitant

> duty to ensure compliance with the terms of the remand, either personally or as 'the head of the department'..."

See the Veterans Court's Order dated December 8, 1998. (Pet.App. F 26a)

Thereafter, and as a result, the Veterans Court, on February 11, 1999, ordered:

> "...In the present case, because the December 1998 statement from the VA doctors indicates that the necessary tissue sample has been obtained, the petitioner has failed to demonstrate a clear and indisputable right to the writ...
> ...On consideration of the foregoing, it is...
> ORDERED that the petitioner's request for extraordinary relief is denied..."

See the Veterans Court's Order dated February 11, 1999. (Pet.App. G 32a)

01-1233 Elmer A. Hawkins 7/19/2001

On or about July 19, 2001, Petitioner filed a Second Petition for Extraordinary Relief seeking two things: (1) Sanctioning the Secretary for misrepresentation to the Veterans Court and (2) a Veterans Court order that the DVA render a decision on his claim within a specified period and that the Veterans Court retain jurisdiction until such time. (Pet.App. H 36a)

The Veterans Court ultimately dismissed that Second Petition for Extraordinary Relief and held, among other reasons, on September 4, 2001,

> "...Under these circumstances, the Court concludes that the petitioner has not satisfied his burden of demonstrating a lack of adequate alternative means to obtain the relief sought. For that reason and for the reasons set forth above, the Court will deny the petition. However, the Court notes that, as of the date of the issuance of the instant order, **the petitioner's claim for disability compensation benefits is almost 11 years old. Accordingly, in the event that the petitioner has not received a final administrative determination on the issue of service connection by January 1, 2002, he is free to file another petition**..." (Emphasis supplied.)

See the Veterans Court's Order dated September 4, 2001. (Pet.App. H 36a)

01-1359 Elmer A. Hawkins 8/9/2001

Also, on or about July 19, 2001, Petitioner filed a "protective" appeal to the Veterans Court of an April 30, 2001, BVA decision to remand this claim to the regional office. See Veterans Court's Order dated September 20, 2001. (Pet.App. I 45a)

After the Veterans Court dismissed the Second Petition For Extraordinary Relief under docket number 01-1233, the Veterans Court dismissed this appeal. See the Veterans Court's Order dated September 20, 2001 (Pet.App. I 45a)

02-0012 Elmer A. Hawkins 1/8/2002

As of January 1, 2002, Petitioner had not received a final administrative determination on the issue of service connection.

Petitioner filed his Third Petition for Extraordinary Relief on or about January 7, 2002. Petitioner sought a court order granting of service connection or alternatively giving the Secretary a deadline to make a decision on the claim. (Pet.App. J 49a)

On or about April 3, 2002, the Veterans Court denied the petition. In that Order, the Veterans Court notes that ***subsequent*** to the filing of this Third Petition for Extraordinary Relief that the Secretary made a decision on the claim. See the Veterans Court's Order dated April 3, 2002. (Pet.App. J 49a)

02-1578 Elmer A. Hawkins 9/19/2002

Prior to September 11, 2002, the Board again denied the claim. On or about September 11, 2002, Petitioner filed a notice of appeal with the Veterans Court. (Pet.App. K 57a)

On or about March 2, 2006, the Veterans Court, among other things, vacated and remanded the decision in part for adjudication under circumstances which included the following:

> "...On remand, VA is directed to provide Mr. Hawkins with a medical examination or obtain a medical opinion regarding the possible nexus between his presumed exposure to Agent Orange and his lipomas...Any examination

> report or opinion obtained must include a discussion addressing the significance of the statistics regarding lipomas in Vietnam and non-Vietnam veterans that were cited by Drs. Iry, Lewis-Smith, and Mullick in their reports..."

See the Veterans Court's Memorandum Decision dated March 2, 2006. (Pet.App. K 57a)

08-2336 Elmer A. Hawkins 7/25/2008

On or about July 28, 2008, Petitioner filed his Fourth Petition for Extraordinary Relief seeking:

A. Disclosure to petitioner of medical files, records, reports and other papers and documents pertaining to petitioner's claim;

B. Grant service connection;

C. Abide by this Court's orders on remand; and

D. Adjudicate petitioner's claim under general principles of fair process according to law of this case and *Thurber v. Brown*, 5 Vet.App. 199 (1993) (Pet.App. B 6a)

More than thirty (30) days ***after*** this Fourth Petition for Extraordinary Relief was filed and served via facsimile on the Secretary, the Secretary, on August 29, 2009, mailed another decision acknowledging that the regional office failed to comply with remand orders and again remanded the case to the regional office (Pet.App. B 7a)

Petitioner also filed a protective appeal of that August 29, 2009, decision. The docket number was 08-2832. (Pet.App. L 75a)

The Veterans Court, by single judge opinion, dismissed the petition for extraordinary relief. (Pet.App. B 6a)

The Veterans Court overruled appellant's motion for panel review. (Pet.App. C 13a)

The Veterans Court dismissed the protective appeal. (Pet.App. L 75a)

2009-7068 US Court of Appeals For The Federal Circuit Docket

Petitioner appealed the Veterans Court dismissal of his Fourth Petition for Extraordinary Relief to the United States Court of Appeals For The Federal Circuit. (Pet.App. A 1a)

With a dissenting opinion, the United States Court of Appeals For The Federal Circuit dismissed that appeal. (Pet.App. A 1a)

No decisions have been published.

REASON FOR GRANTING THE PETITION

The Respondent, the Secretary of Veterans Affairs, has an insidious practice that only this Supreme Court can put an end to, *i.e.* of keeping the claim involved in years of proceedings which will end when the veteran dies.

Petitioner is a combat veteran of the Vietnam War who was exposed to Agent Orange. (Pet.App. T 111a)

Petitioner has severe disabilities that were absolutely caused by his exposure to Agent Orange. (Pet.App. T 111a; S 105a; N 79a; O 85a; P 89a; Q 95a)

Congress passed a law that Petitioner should be compensated as a result.

For two (2) decades, Respondent is refusing to render a decision whether or not to compensate Petitioner by "playing procedural games".

Pursuant to this Court's Rule 10(c), a majority of the United States Court of Appeals for the Federal Circuit is allowing Respondent to continue its insidious practice of administrative obfuscation hoping the veteran's claim will languish and cease to exist due to any number of missed deadlines or the veteran's own death.

This is an exceptionally important question of federal law that has not been, and should be determined by this Court. Only this Court can put a stop to it.

I. Petitioner Is Entitled By Law To Compensation.

Petitioner is a Vietnam Veteran who was exposed to Agent Orange while serving in Vietnam. (Pet.App. T 111a)

Petitioner suffers with neoplasms of his skin. (Pet.App. S 105a)

Petitioner's tumors are likely due to his exposure to Agent Orange. (Pet.App. S 105a)

38 U.S.C. § 1110 is entitled "Basic entitlement". Among other things, the law states:

> "For disability resulting from personal injury suffered or disease contracted in line of duty...in active military, naval, or air service, during a period of war, the United States ***will pay*** to any veteran thus disabled...compensation..." (Emphasis supplied.)

II. Insidious Practice Of Procedural Games

The following is a summary of Respondent's "games" for the past 19 years.

Respondent denies Petitioner's claim, and Petitioner appeals. (Pet.App. D 15a; I 45a; K 57a; L 75a;

The U.S. Court Of Appeals For Veterans Claims vacates the denial and remands the claim with specific instructions. (Pet.App. K 57a)

After many years of inaction, Respondent denies the claim and ignores the court's remand instructions. (Pet.App. E 17a; H 36a; K 57a)

Petitioner complains, and then Respondent remands the claim with orders to comply with the court's remand instructions. (Pet.App. B 7a; L 75a)

After several more years, Respondent violates any number of statutory duties one at a time owing to

appellant and denies the claim. (Pet.App. B 6a; D 15a; I 45a; E 17a; F 26a; G 32a; K 57a)

After several more years, the Secretary obtains new medical tests and results and hides those results from Petitioner and his doctors. (Pet.App. B 6a; E 17a)

Petitioner files mandamus petitions, and thereafter, Respondent corrects his actions and complies with his statutory duties. (Pet.App. B 7a; E 17a; F 26a; G 32a; J 49a)

As a result of Respondent's belated actions, the mandamus petitions are thereafter denied and dismissed. (Pet.App. B 7a; E 17a; F 26a; G 32a; J 49a)

After several more years, the Secretary again denies the claim and begins repeating previous violations of statutory duties owing to appellant. (Pet.App. B 7a)

Appellant appeals, and the claim is remanded again with remand instructions. (Pet.App. K 57a)

And so-on.

The only difference now is the Secretary is ignoring appellant's deteriorating health situation and refusing to divulge medical information that might be needed to save his life. (Pet.App. B 6a)

III. Faithful Execution Of The Law

Article I, Section 1, of the Constitution of the United States provides:

> "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Article II, Section 1, of the Constitution of the United States provides:

> "The executive Power shall be vested in a President of the United States of America..."

In *Youngstown Sheet & Tube Co., v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863 (1952), the Court holds:

> "...In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker..."

The Department of Veterans Affairs, an executive agency, can only faithfully execute the law.

38 U.S.C. § 1110 is entitled "Basic entitlement". Among other things, the law states:

> "For disability resulting from personal injury suffered or disease contracted in line of duty...in active military, naval, or air service, during a period of war, the United States ***will pay*** to any veteran thus disabled...compensation..." (Emphasis supplied.)

Congress established a procedure to determine whether veterans are entitled to compensation for service related injuries.

Appellant respectfully urges that the administrative record in these 19 years of proceedings clearly show the Veterans Administration is refusing to apply the law to the facts and decide whether or not to award appellant benefits or not.

CONCLUSION

This Court should order that this Veteran, Petitioner, receive his rights under the Statute as suffering from the United States Army's use of Agent Orange. Had there been a legitimate reason to deny such, the Secretary of Veterans Affairs, Respondent, would have concluded this matter years ago. The fact Respondent kept Petitioner in procedural limbo for 19 years demonstrates his entitlement.

Respectfully submitted this 5th day of March, 2010.

J. Myers Morton
Counsel of Record
Morton & Morton, PLLC
One Morton Place
1518 N. Broadway
Knoxville, Tennessee 37917
(865) 523-2000
myersmorton@comcast.net

Counsel for Petitioner
Elmer A. Hawkins

APPENDIX

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APPENDIX A

NOTE: This disposition is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 2009-7068

[Filed December 7, 2009]

ELMER A. HAWKINS,

Claimant-Appellant,

v.

ERIC K. SHINSEKI,
Secretary of Veterans Affairs,

Respondent-Appellee.

Appeal from the United States Court of Appeals for Veterans Claims in 08-2336.

DECIDED: December 7, 2009

Before MAYER and RADER, Circuit Judges, and WILKEN,* District Judge.

Opinion for the court filed by Circuit Judge MAYER. Dissenting opinion filed by District Judge, WILKEN.

MAYER, Circuit Judge.

Elmer A. Hawkins challenges the Court of Appeals for Veterans Claims ("Veterans Court") refusal to issue a writ of mandamus. Hawkins v. Peake, Sec'y of Veterans Affairs, No. 08-2336 (Ct. Vet. App. Feb. 23, 2009). We affirm.

Hawkins seeks a writ of mandamus to instruct the Secretary of Veterans Affairs to: disclose medical files, records, reports, and other documents pertaining to the petitioner's claim; grant the petitioner service connection; abide by the Veterans Court's remand instructions; and "adjudicate petitioner's claim under general principles of fair process according to law of this case and Thurber v. Brown, 5 Vet. App. 119 (1993)."

We review this case under the All Writs Act. See 28 U.S.C. § 1651(a). A writ of mandamus will issue if a petitioner can show: (1) no other adequate means to attain the desired relief; and (2) an indisputable right to issuance of the writ. Cheney v. U.S. Dist. Ct., 542 U.S. 367, 380-81 (2004). Hawkins has not met this burden.

---

* Honorable Claudia Wilken, District Judge, United States District Court for the Northern District of California, sitting by designation.

The Veterans Court remanded Hawkins's appeal to the Board of Veterans' Appeals. The board has remanded to a regional office ("RO") of the Department of Veterans Affairs ("VA") to ensure compliance with a March 2006 order of the Veterans Court. The RO may yet grant Hawkins VA benefits. Even if no VA benefits are granted by the RO, Hawkins has access to appellate review. As such, adequate means exist to attain the desired relief. Additionally, remand to the RO for developing a more complete record benefits Hawkins. The RO's March 25, 2008, Supplemental Statement of the Case denied service connection. Without service connection an indisputable right to the expansive relief sought in Hawkins's petition for a writ of mandamus does not exist. Accordingly, the Veterans Court did not abuse its discretion in denying the writ.

WILKEN, District Judge, dissenting.

I respectfully dissent. I would grant Appellant's writ.

Appellant, a Vietnam War veteran, has waited almost two decades for a final decision on his benefits application. His claim, filed on October 22, 1990, asserts that his chronic and severe medical conditions are connected to his service due to exposure to Agent Orange. Over the past nineteen years, the Department of Veterans Affairs ("DVA") and its predecessor, the Veterans' Administration, have made repeated errors which have prolonged the decision-making process. Appellant's case is currently again before a regional office ("RO") of the DVA, on remand from the Board of Veterans' Appeals.

I would issue a narrowly-tailored writ to expedite the resolution of Appellant's claim. The writ would require the RO to adjudicate his claim within three months. This Court would retain jurisdiction to monitor the progress of the case to a final, appealable decision.

Appellant has shown that he lacks adequate alternative means to attain the desired relief and that he has a right to the writ, Cheney v. U.S. Dist. Court, 542 U.S. 367, 380-81 (2004), because the delay in a final appealable adjudication of his case has been "so extraordinary, given the demands on and resources of the Secretary, that it is equivalent to an arbitrary refusal by the Secretary to act." Ribaudo v. Nicholson, 20 Vet. App. 552 (2007) (citing Costanza v. West, 12 Vet. App. 133, 134 (1999)). The government's numerous errors in adjudicating Appellant's claim,

which have required multiple remands, cannot be excused as products of a burdened system. See Costanza, 12 Vet. App. at 134. A writ requiring the RO to act within three months would not constitute a substitute for the appeals process, nor would it involve a review of the merits of Appellant's case. See 38 U.S.C. § 7292(d).

Issuing a writ here would not expose the Court to a flood of similar claims. It is to be hoped that Appellant's nineteen-year wait does not represent the experience of most veterans, but rather stands as an outlier that this Court should address.

APPENDIX B

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 08-2336

[Dated November 20, 2008]

ELMER A. HAWKINS, PETITIONER,	)
	)
v.	)
	)
JAMES B. PEAKE, M.D.,	)
SECRETARY OF VETERANS AFFAIRS,	)
RESPONDENT.	)
	)

Before SCHOELEN, *Judge*.

ORDER

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

On July 28, 2008, the petitioner, Elmer A. Hawkins, through counsel, filed with the Court a petition for extraordinary relief in the form of a writ of mandamus instructing the Secretary to disclose medical files, records, reports, and other documents pertaining to the petitioner's claim; grant the

petitioner service connection; abide by the Court's remand instructions; and "adjudicate petitioner's claim under general principles of fair process according to law of this case and *Thurber v. Brown*, 5 Vet.App. 119 (1993)." Petition (Pet.) at 1.

Since he filed his petition, the petitioner has filed four motions to supplement his petition. On August 13, 2008, he filed a motion to supplement his petition with a letter he received from VA and his subsequent reply. On September 5, 2008, he filed a motion to supplement his petition with an August 25, 2008, Board of Veterans' Appeals (Board) decision remanding his claim for further development. On September 18, 2008, he filed a motion to supplement his petition with a September 9, 2008, letter he received from VA notifying him that his claim was being transferred to a regional office. He filed a fourth motion to supplement his petition on October 16, 2008, attaching an October 9, 2008, letter from VA stating that VA was providing him with "all evidence collected from April 7, 2007 to the present time." He also attached a myriad of documents he received from VA with that letter. In his stream of correspondence to the Court, the petitioner also requested an oral argument pursuant to Rule 34(a) of the Court's Rules of Practice and Procedure. He filed a motion to consolidate this petition with a Substantive Appeal from his denial at the Board on October 15, 2008; the Court denied his motion to consolidate in a November 7, 2008, order (the Court also dismissed his appeal in that order). *See Hawkins v. Peake*, __ Vet.App. __, No. 08-2832 (Nov. 7, 2008) (table).

On August 22, 2008, the Court ordered the Secretary to file a response to the petition. The

Secretary filed his response on October 21, 2008. *See* Secretary's Response (Resp.) at 1-6. The Secretary contends that the petitioner is not entitled to a writ of mandamus because the Board issued a remand of the petitioner's claim on August 25, 2008, and thus the petitioner has not exhausted his administrative remedies. *Id.* at 3. He argues that the petitioner's request that the Court grant service connection would require the Court to impermissibly expand its jurisdiction. *Id.* at 4-5. With respect to documents the petitioner asserts have not been disclosed to him, the Secretary contends that VA recently delivered a "complete copy of the claims file" to the petitioner. *Id.* at 4. Finally, the Secretary states that, contrary to the petitioner's assertion, he has undertaken efforts to comply with the Court's March 2, 2006, remand, and he is continuing to comply by recently requesting another medical examination. *Id.* at 5. The petitioner filed a response to the Secretary's response on October 28, 2008, in which he essentially reiterates his position.

This Court has the authority to issue extraordinary writs in aid of its jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651(a). *See Cox v. West*, 149 F.3d 1360, 1363-64 (Fed. Cir. 1998). However, "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402 (1976). Accordingly, three conditions must be met before a court may issue a writ: (1) The petitioner must lack adequate alternative means to attain the desired relief, thus ensuring that the writ is not used as a substitute for the appeals process; (2) the petitioner must demonstrate a clear and indisputable right to the writ; and (3) the Court must be convinced, given the circumstances, that the issuance of the writ

is warranted. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004).

With respect to the petitioner's claim that the Secretary has failed to disclose medical files, records, reports, and other papers and documents pertaining to his claim, the Secretary has furnished "a complete copy of the claims file" to the petitioner. *See* Secretary's Resp. at 4. Thus, the Secretary has satisfied the petitioner's request and the writ is not necessary. *See Cheney, supra*.

The petitioner next asks the Court to "[g]rant service connection" (Pet. at 1), presumably for benign soft tissue growths (lipomas), claimed as soft tissue sarcomas, claimed as due to exposure to herbicide. He argues that he has a clear and indisputable right to such a writ because "the Secretary is not, under any circumstances, going to grant petitioner service connection" and because of undue delay. Pet. at 11-12. He argues that he lacks adequate alternatives to obtain relief for essentially the same reasons. *Id.* at 12. The Secretary argues that the Court lacks jurisdiction to adjudicate this claim. Secretary's Resp. at 4 (citing *Bates v. Nicholson*, 398 F.3d 1355, 1359 (Fed. Cir. 2005)). Even assuming that the Court has jurisdiction, the petitioner is asking the Court to adjudicate the merits of his claim, and a petition is not the proper vehicle for such action. *See Cheney, supra*. Because the petitioner's claim was remanded on August 25, 2008, to the VA regional office (RO) for development (Secretary's Resp. Exhibit (Ex.) 1), it is possible that VA will grant the benefit that he seeks. If it does not, the petitioner may pursue appellate review of any final, adverse Board decision using the standard appellate procedures at this Court.

To the extent that the petitioner is arguing undue delay in the adjudication of his claim for entitlement to service connection, the Court has held that a clear and indisputable right to the writ does not exist unless the petitioner demonstrates that the alleged delay is so extraordinary, given the demands on and resources of the Secretary, that it is equivalent to an arbitrary refusal by the Secretary to act. *See Costanza v. West*, 12 Vet.App. 133, 134 (1999) (per curiam order). However, the Court does not find an arbitrary refusal to act on the part of the Secretary here, particularly in light of the August 25, 2008, Board remand (Secretary's Resp. Ex. 1), and VA's October 9, 2008, request for an additional medical examination in connection with that remand (Secretary's Resp. Ex. 3, 4). Accordingly, the petitioner has failed to demonstrate an extraordinary delay in the adjudication of his claim.

Finally, the petitioner asks the Court to issue a writ of mandamus instructing the Secretary to "[a]bide by this Court's orders on remand" and to "adjudicate petitioner's claim under general principles of fair process according to law of this case and *Thurber v. Brown*, 5 Vet.App. 199 (1993)." Pet. at 1. Specifically, he states that the Secretary has failed to comply with this Court's March 2, 2006, remand because a March 25, 2008, Supplemental Statement of the Case failed to include discussion of statistics regarding lipomas in Vietnam and non-Vietnam veterans. *Id.* at 13. The Court's remand directed VA to provide the appellant with a medical examination or a medical opinion "regarding the possible nexus between his presumed exposure to Agent Orange and his lipomas." Pet. Ex. 27 at 10. The remand stated that such a report or opinion should address "the significance of the

statistics regarding lipomas in Vietnam and non-Vietnam veterans that were cited by Drs. Irey, Lewis-Smith, and Mullick in their reports." *Id.* at 11. However, the Board's August 25, 2008, remand specifically addresses this issue and requires the examiner to discuss the cited statistics. *See* Secretary's Resp. Ex. 1 at 5-9. As such, VA is attempting to obtain a medical opinion that is in accordance with the Court's March 2, 2006 remand, and once that opinion is provided, the appellant's claim will be readjudicated. *See* Secretary's Resp. Ex. 1 at 9. Thus, the appellant has not exhausted all other administrative remedies, and he cannot demonstrate a clear and indisputable right to the writ. *See In re Quigley*, 1 Vet.App. 1, 2 (1989).

Upon consideration of the foregoing, it is

ORDERED that the petitioner's motions to supplement his petition, dated August 13, 2008, September 5, 2008, September 18, 2008, and October 16, 2008, are GRANTED. It is further

ORDERED that the petitioner's request for an oral argument pursuant to Rule 34(a) of this Court's Rules of Practice and Procedure is DENIED. It is further

ORDERED that the petition for extraordinary relief in the nature of a writ of mandamus is DENIED.

DATED: November 20, 2008

BY THE COURT:

/s/ Mary J. Schoelen

MARY J. SCHOELEN
Judge

Copies to:

A. Myers Morton, Esq.
VA General Counsel (027)

APPENDIX C

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 08-2336

[Dated February 23, 2009]

ELMER A. HAWKINS, PETITIONER,	)
	)
v.	)
	)
ERIC K. SHINSEKI,	)
SECRETARY OF VETERANS AFFAIRS,	)
RESPONDENT.	)
	)

Before GREENE, *Chief Judge* and MOORMAN and SCHOELEN, *Judges*.

ORDER

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

In an order dated November 20, 2008, the Court denied the petitioner's petition for extraordinary relief in the nature of a writ of mandamus. On November 28, 2008, the petitioner filed a timely motion for a panel decision.

Upon consideration of the foregoing and the prior submissions of the petitioner, it is

ORDERED that the motion for a panel decision is denied.

DATED: February 23, 2009 PER CURIAM.

Copies to:

J. Myers Morton, Esq.
VA General Counsel (027)

APPENDIX D

UNITED STATES COURT OF VETERANS APPEALS

No. 96-192

[Dated October 1, 1996]

ELMER A. HAWKINS, APPELLANT,

v.

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS, APPELLEE.

ORDER

The parties have filed a joint motion to remand this appeal to the Board of Veterans' Appeals (BVA). It is

ORDERED that the motion is granted. The BVA decision is vacated. The matter is remanded pursuant to 38 U.S.C. § 7252(a). Under Rule 41(b) of the Court's Rules of Practice and Procedure, this order is the mandate of the Court.

Any application authorized by 28 U.S.C. § 2412 for attorney fees and expenses must be received within 30 days after the date of this order.

DATED: OCT - 1 1996

FOR THE COURT

/s/Robert F. Comeau
ROBERT F. COMEAU
Clerk of the Court

Copies to:

J. Myers Morton, Esq.
One Centre Square, #620
Knoxville, TN 37902

General Counsel (027)
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

rw

True Copy
By: /s/
Deputy Clerk

APPENDIX E

Designated for electronic publication only

UNITED STATES COURT OF VETERANS APPEALS

No. 98-1383

[Dated September 29, 1998]

ELMER A. HAWKINS, PETITIONER,	)
	)
v.	)
	)
TOGO D. WEST, JR.,	)
SECRETARY OF VETERANS AFFAIRS,	)
RESPONDENT.	)
	)

Before KRAMER, *Judge*.

ORDER

Note: Pursuant to U.S. Vet. App. R. 28(i), this action may not be cited as precedent.

In September 1996, the petitioner and the Secretary filed with the Court a joint motion for remand, requesting the Court to vacate a February 1996 Board of Veterans' Appeals (BVA or Board) decision, which determined that the petitioner had not submitted a well-grounded claim for service connection

for soft tissue growths secondary to exposure to Agent Orange. The parties stated in the motion, inter alia, that the Board, upon remand, should "review and articulate its decision regarding whether [the petitioner] has submitted a well [-]grounded claim concerning presumptive service connection" and that, if appropriate, the Board should obtain a medical opinion as to the etiology of the petitioner's tumors. The Court, on October 1, 1996, granted the motion, vacated the February 1996 Board decision, and remanded the matter to the Board for further proceedings. *See Hawkins v. Brown,* U.S. Vet.App. No. 96-192 (Clerk's order Oct. 1, 1996). On remand, the Board, in February 1997, issued a decision remanding the matter to a VA regional office (RO) for further development, stating, inter alia, that the petitioner should be contacted in order to obtain his permission to secure from Dr. Carlos L. Velado additional information regarding the medical opinions Dr. Velado rendered in support of the petitioner's claim. The Board further stated that "if the claim cannot be allowed, [the petitioner] is to be given a special dermatological examination for the purpose of obtaining (with his permission) tissue samples."

The petitioner, on August 3, 1998, filed with the Court a petition for extraordinary relief in the nature of mandamus, requesting the Court to compel the Secretary to do the following: (1) return tissue samples and slides provided to VA by the petitioner (item 1); (2) provide the petitioner with access to two treatises upon which Dr. Nelson S. Irey, Chairman of the Department of Environmental and Toxicologic Pathology, relied in rendering an expert opinion in August 1995 (item 2); (3) "[a]bide by the law of the case" by articulating the reasons for denying service

connection (item 3) and by assisting the petitioner in developing his claim, which would include obtaining a dermatological examination with tissue samples (item 4); and (4) determine and advise the petitioner of the status of his claim (item 5). Petition at 1-3. In his petition, the petitioner averred, inter alia, that he has repeatedly requested the Secretary to provide access to the requested treatises and that his requests have been ignored. He submitted with his petition copies of several letters sent to the Board and the RO requesting access to such treatises. Petition at 3; *see also* Petition, Exhibits 7, 9, 10, 14.

In response to the petition, the Secretary stated that the tissue samples have been returned to the petitioner and that the RO has requested a VA compensation and pension examination, which will include obtaining new tissue samples. Secretary's Response at 3, 5. The Secretary further asserted that the petitioner's claim remains pending at the RO level and is being processed in accordance with the Board's February 1997 remand decision. *Id.* at 5. In addition, the Secretary stated that the treatises requested by the petitioner are within the custody and control of the Department of Defense, not VA, and that the Secretary is not required to provide the petitioner with treatises relied upon by a medical expert that are not within the Secretary's control. *Id.* at 4. In conclusion, the Secretary argued, inter alia, that the writ should be denied because there is no evidence that VA has refused to act upon the petitioner's claim or that the Court's potential jurisdiction will be frustrated. *Id.* at 5-6.

On September 8, 1998, the petitioner submitted to the Court a motion to file a reply to the Secretary's

Response, and, on the same date, he submitted a filing styled as a "Response to the Secretary's Response" (Petitioner's Response). To the extent the petitioner alleges in this latter filing new bases for requesting the issuance of a writ, the Court will construe the petitioner's filings as a motion to supplement the petition and as a supplemental petition. To the extent he addresses, in that filing, the allegations contained in his original petition, the Court will construe the filings as a motion to file a reply to the Secretary's response and as a reply.

In his construed supplemental petition, the petitioner alleges that the Secretary has failed to comply with "the law of the case" because "there have been no attempts by [the Secretary] to obtain additional evidence from Dr. Velado" (item 6). Petitioner's Response at 1. The petitioner asserts, however, that such further information, in light of the evidence presently of record, is superfluous. *Id.* In addition, the petitioner notes, in the supplemental petition, that he has been scheduled for an appointment at a VA hospital to have tumors removed in December 1998 and asserts that he "cannot wait" until the scheduled appointment to have these tumors removed. *Id.* at 1-2. Essentially he asserts that, under the law of the case, VA should be directed to schedule an appointment for removal of the tumors earlier than December 1998 (item 7). *Id.* He further asserts that he is "for the first time" requesting the Secretary to "provide or make available the National Academy of Sciences studies" (item 8) that were referred to in a Supplemental Statement of the Case, stating that "without this Court's order, [the] petitioner verily believes that request will be ignored." *Id.* at 3; *see also* Petition at 4. Finally, he asserts that the Secretary has

"ignored" the Court's and the Board's prior remand orders, as evidenced by the elapse of twenty-two months since the Court's remand order and that it is thus clear that the petitioner has no administrative remedy. Petitioner's Response at 3.

In his construed reply, the petitioner asserts that one of the treatises he requested VA to provide is prohibitively expensive and that the other is apparently unobtainable because it is not a public record. Petitioner's Response at 2. In addition, he states that he was notified that an appointment with a dermatologist has been scheduled but that he believes the doctor will be unable to obtain new tissue samples at that time. *Id.* at 1. In an affidavit accompanying his reply, the petitioner also states that the requested tissue samples have been returned. On September 16, 1998, the petitioner submitted to the Court a supplemental affidavit, stating that a VA examination was conducted on September 9, 1998, and indicating that new tissue samples were not taken at that examination.

This Court has authority to issue extraordinary writs in aid of its jurisdiction pursuant to the All Writs Act (AWA), 28 U.S.C. § 1651(a). *See Cox v. West,* 149 F.3d 1360 (Fed. Cir. 1998). However, "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. United States District Court,* 426 U.S. 394, 402 (1976). Before a court may issue a writ, a petitioner must demonstrate: (1) a clear and indisputable right to the writ and (2) lack of adequate alternative means to obtain the relief sought. *See Erspamer v. Derwinski,* 1 Vet.App. 3, 9 (1990). For the reasons that follow, the Court holds, in part, that

the petitioner has not met this burden with respect to items 1, 3, 5, 6, 7, and 8.

With respect to items 1 and 5, in view of the evidence that the Secretary has complied with the petitioner's requests, the Court will dismiss the petition as moot. *See Mokal v. Derwinski,* 1 Vet.App. 12, 15 (1990). With respect to item 3, because the petitioner has not exhausted his administrative remedies, the writ must be denied. *See Friscia v. Brown,* 8 Vet.App. 90, 91 (1995) (petitioner not entitled to writ because he had not exhausted administrative remedies prior to filing petition for writ). Furthermore, the Court will decline to issue a writ with respect to item 6 because the petitioner has asserted that additional information from Dr. Velado is unnecessary and has therefore not demonstrated a clear and indisputable right to a writ directing the Secretary to obtain such information. In this regard, the Court notes that it can be inferred from the petitioner's assertions that he does not intend to consent to Dr. Velado's release of such information. With respect to item 7, the Court notes that neither the Court's prior remand order nor the Board's February 1997 remand order addresses the removal of the petitioner's tumors. *See Stegall v. West,* 11 Vet.App. 268, 271 (1998) (remand by Court or Board confers on claimant right to compliance with remand orders). To the extent the petitioner otherwise asserts a need for an earlier appointment, he has not demonstrated, or even alleged, that he has a right to a writ directing that an earlier appointment be scheduled or that he lacks adequate alternative means to obtain such relief. With respect to item 8, because the petitioner in his construed petition acknowledges that he is making this request now for the first time, he has not

demonstrated that he has exhausted alternative remedies.

With respect to item 2, the Court initially notes that it appears from the documents attached to the petition and the Secretary's response that the appellant's claim for presumptive service connection is well grounded. The petitioner has also submitted copies of multiple letters that he sent to the RO and the BVA requesting access to the treatises in question, to which the Secretary has apparently not responded. In addition, the petitioner avers that the treatises are either unavailable or prohibitively expensive. The Secretary, in his response, has not contested these assertions, which essentially constitute the petitioner's allegation that he lacks an adequate alternative remedy. The Court further notes that the Secretary in his response has made no assertions as to whether the statutory duty to assist requires the Secretary to attempt to obtain the requested treatises. *See* 38 U.S.C. § 5107(a); *Epps v. Gober,* 126 F.3d 1464, 1469 (Fed. Cir. 1997); *see also* 38 U.S.C. § 5106. Nor has the Secretary addressed whether the Secretary is required to attempt to obtain such treatises under general principles of fair process. *Cf. Thurber v. Brown,* 5 Vet.App. 119 (1993); *Austin v. Brown,* 6 Vet.App. 547 (1994). Finally, the Court notes that the petitioner has not requested that a writ issue to any entity other than the Secretary.

On consideration of the foregoing, it is

ORDERED that the petitioner's construed motion to file a supplemental petition and to file a reply is granted. The Clerk will file the supplemental petition and reply as of the date of this order. It is further

ORDERED that the petition for extraordinary relief in the nature of mandamus is DISMISSED with respect to items 1 and 5. It is further

ORDERED that the petition is DENIED with respect to items 3, 6, 7, and 8. It is further

ORDERED, with respect to item 2, that, within 30 days after the date of this order, the Secretary either (1) submit a legal memorandum addressing whether the Court, based upon a violation of the duty to assist or fair process, should issue a writ directing the Secretary to make reasonable attempts to obtain relevant portions of the requested treatises or (2) provide the Court with a statement as to what steps the Secretary has taken to obtain relevant portions of the treatises or to provide the petitioner with information regarding the location of such treatises. It is further

ORDERED, with respect to item 4, that, within 30 days after the date of this order, the Secretary advise the Court as to whether tissue samples have been obtained and, if not, when such tissue samples will be obtained. It is further

ORDERED that, after the Secretary submits a filing pursuant to this order, the petitioner may, within 30 days after the date of such filing, submit a response to the Court.

DATED: SEP 29 1998 BY THE COURT:

/s/Kenneth B. Kramer
KENNETH B. KRAMER
Judge

Copies to:

J. Myers Morton, Esq.
Suite 620, One Centre Square
620 Market Street
Knoxville, TN 37902

General Counsel (027)
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

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APPENDIX F

Designated for electronic publication only

UNITED STATES COURT OF VETERANS APPEALS

No. 98-1383

[Dated December 8, 1998]

ELMER A. HAWKINS, PETITIONER,	)
	)
v.	)
	)
TOGO D. WEST, JR.,	)
SECRETARY OF VETERANS AFFAIRS,	)
RESPONDENT.	)
	)

Before KRAMER, *Judge*.

ORDER

Note: Pursuant to U.S. Vet. App. R. 28(i), this action may not be cited as precedent.

In September 1996, the petitioner and the Secretary filed with the Court a joint motion for remand, requesting the Court to vacate a February 1996 Board of Veterans' Appeals (BVA or Board) decision, which determined that the petitioner had not submitted a well-grounded claim for service connection

for soft tissue growths secondary to exposure to Agent Orange. The parties stated in the motion, inter alia, that the Board, upon remand, should "review and articulate its decision regarding whether [the petitioner] has submitted a well[-]grounded claim concerning presumptive service connection" and that, if appropriate, the Board should obtain a medical opinion as to the etiology of the petitioner's tumors. The Court, on October 1, 1996, granted the motion, vacated the February 1996 Board decision, and remanded the matter to the Board for further proceedings. *See Hawkins v. Brown,* U.S. Vet. App. No. 96-192 (Clerk's order Oct. 1, 1996). On remand, the Board, in February 1997, issued a decision remanding the matter to a VA regional office (RO) for further development, stating, inter alia, that "if the claim cannot be allowed, [the petitioner] is to be given a special dermatological examination for the purpose of obtaining (with his permission) tissue samples."

The petitioner, on August 3, 1998, filed with the Court a petition for extraordinary relief in the nature of mandamus, requesting the Court, inter alia, to compel the Secretary to provide the petitioner with access to two treatises upon which Dr. Nelson S. Irey, Chairman of the Department of Environmental and Toxicologic Pathology, relied in rendering an expert opinion in August 1995 and to obtain a dermatological examination where tissue samples are removed. On September 29, 1998, the Court ordered the Secretary, inter alia, to either (1) submit a legal memorandum addressing whether the Court should issue a writ directing the Secretary to make reasonable attempts to obtain relevant portions of the requested treatises or (2) provide the Court with a statement as to what steps the Secretary has taken to obtain relevant

portions of the treatises or to provide the petitioner with information regarding the location of such treatises. The Court further ordered the Secretary to advise the Court as to whether tissue samples have been obtained and, if not, when such tissue samples will be obtained.

On October 27, 1998, the Secretary filed a response, setting forth detailed information regarding the steps taken by the Secretary to locate the requested medical treatises. In addition, the Secretary stated that Dr. Irey is now deceased. Further, the Secretary noted that the petitioner had been scheduled for an examination on November 9, 1998, at a VA medical center and that the facility had been informed that tissue samples should be obtained. The Secretary asserts that the Court should decline to issue a writ because the petitioner has presented no evidence that VA is refusing to act on his claim or that the Court's jurisdiction will be frustrated.

The petitioner, on November 10, 1998, filed a reply to the Secretary's response, indicating that he has obtained a copy of one of the treatises and that the second treatise is being forwarded to a library to which he has access. The petitioner asserts that the treatise he has obtained contains in excess of one thousand pages and that neither Dr. Irey nor the Secretary has provided the petitioner with references to the specific material relied upon by Dr. Irey in rendering his August 1995 opinion. He requests the Court to order the Secretary to provide the petitioner with information regarding the specific pages or chapters relied upon by Dr. Irey. With regard to the tissue samples, the petitioner states that, on November 9, 1998, he attended the scheduled appointment at a VA

medical center and that he was informed by the attending physician that "in order to remove [tissue] samples, the entire tumors had to be removed, that he was unable to do so[,] and that [the petitioner] needed a surgeon to remove all the [tumors] to obtain samples." The petitioner further states that, on the same date, a VA employee stated that she would schedule an appointment with a urologist and a surgeon in order to have all of the petitioner's tumors removed. The Court notes that the petitioner had previously indicated, in his September 8, 1998, filing, that he has an appointment scheduled in December 1998 to have the tumors removed. On November 24, 1998, the petitioner filed a supplemental response, stating that he has received a copy of the second treatise.

This Court has authority to issue extraordinary writs in aid of its jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651(a). *See Cox v. West,* 149 F.3d 1360 (Fed. Cir. 1998). However, "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. United States District Court,* 426 U.S. 394, 402 (1976). Before a court may issue a writ, a petitioner must demonstrate: (1) a clear and indisputable right to the writ and (2) lack of adequate alternative means to obtain the relief sought. *See Erspamer v. Derwinski,* 1 Vet.App. 3, 9 (1990).

Considering that the petitioner has obtained copies of the requested treatises, and in view of the fact that Dr. Irey is now deceased, the Court holds that the petitioner has not demonstrated a right to a writ directing the Secretary to provide him with copies of the treatises or to provide him with citations to the specific portions of the treatises relied upon by Dr.

Irey. *See Erspamer*, 1 Vet.App. at 9 (before a court may issue a writ, a petitioner must demonstrate, inter alia, a clear and indisputable right to the writ).

On consideration of the foregoing, it is

ORDERED that the petition is denied with respect to the request to direct the Secretary to provide access to medical treatises relied upon by Dr. Irey and to provide references to specific pages or chapters contained therein. It is further

ORDERED that the Secretary, within 30 days after the date of this order, respond to the petitioner's assertion that he is entitled to a writ because tissue samples have not been obtained. *See Stegall v. West*, 11 Vet.App. 268, 271 (1998) ("[A] remand by this Court or the Board confers on the veteran or other claimant, as a matter of law, the right to compliance with the remand orders ... [and] imposes upon the Secretary of Veterans Affairs a concomitant duty to ensure compliance with the terms of the remand, either personally or as 'the head of the department.'").

DATED: DEC 8 1998 BY THE COURT:

/s/Kenneth B. Kramer
KENNETH B. KRAMER
Judge

Copies to:

J. Myers Morton, Esq.
Suite 620, One Centre Square
620 Market Street
Knoxville, TN 37902

General Counsel (027)
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

alm

APPENDIX G

Designated for electronic publication only

UNITED STATES COURT OF VETERANS APPEALS

No. 98-1383

[Dated February 11, 1999]

ELMER A. HAWKINS, PETITIONER,
v.
TOGO D. WEST, JR., SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before KRAMER, *Judge*.

ORDER

Note: Pursuant to U.S. Vet. App. R. 28(i), this action may not be cited as precedent.

In September 1996, the petitioner and the Secretary filed with the Court a joint motion for remand, requesting the Court to vacate a February 1996 Board of Veterans' Appeals (BVA or Board) decision, which determined that the petitioner had not submitted a well-grounded claim for service connection

for soft tissue growths secondary to exposure to Agent Orange. The Court, on October 1, 1996, granted the motion, vacated the February 1996 Board decision, and remanded the matter to the Board for further proceedings. *See Hawkins v. Brown,* U.S. Vet. App. No. 96-192 (Clerk's order Oct. 1, 1996). On remand, the Board, in February 1997, issued a decision remanding the matter to a VA regional office for further development, stating, inter alia, that "if the claim cannot be allowed, [the petitioner] is to be given a special dermatological examination for the purpose of obtaining (with his permission) tissue samples."

The petitioner, on August 3, 1998, filed with the Court a petition for extraordinary relief in the nature of a writ of mandamus, asserting, inter alia, that VA had failed to comply with the Board's February 1997 remand order because tissue samples had not been obtained. As a remedy, the petitioner requested the Court to issue a writ compelling the Secretary to obtain tissue samples. On December 30, 1998, the Secretary, in response to a Court order, submitted a filing asserting that the Secretary had substantially complied with the February 1997 Board remand order regarding tissue samples. In support of that contention, the Secretary submitted, inter alia, a December 14, 1998, letter from two VA doctors stating:

> Mr. Elmer Hawkins was evaluated on November 9, 1998[,] for a Compensation and Pension Examination (C&P) for Skin Diseases. Numerous nodules were noted at that time. Since the [Board] remand suggested tissue be removed for diagnosis, Mr. Hawkins was referred to Surgical Service for biopsy of a representative nodule.

> Surgical biopsy of all noted nodules was not done because this was a diagnostic C&P exam[ination]. Excision of all nodules would be therapy, which is not routinely performed on a C&P exam[ination]. On November 30, 1998, tissue was obtained from the left knee for diagnosis as indicated on the [Board] remand.

Secretary's Response, Exhibit 2. The petitioner submitted an affidavit also indicating that a tissue sample had been obtained from a tumor on his left knee.

On January 20, 1999, the petitioner submitted a reply to the Secretary's response, as well as an additional affidavit and a motion to expedite. The appellant stated that he had been scheduled for a VA urological operation in February 1999 and that the VA doctors did not intend to remove tissue samples at that time. He requested that the Court issue an order directing the Secretary to have tissue samples removed during that operation. Because the petitioner's January 20, 1999, submissions were not considered by the Court in its January 25, 1999, order, the Court will revoke that order and issue this order in its stead, taking into consideration all of the petitioner's submissions.

This Court has authority to issue extraordinary writs in aid of its jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651(a). *See Cox v. West*, 149 F.3d 1360 (Fed. Cir. 1998). However, "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976). Before a court may issue a writ, a petitioner must demonstrate: (1) a

clear and indisputable right to the writ and (2) lack of adequate alternative means to obtain the relief sought. *See Erspamer v. Derwinski*, 1 Vet.App. 3, 9 (1990). In the present case, because the December 1998 statement from the VA doctors indicates that the necessary tissue sample has been obtained, the petitioner has failed to demonstrate a clear and indisputable right to the writ.

On consideration of the foregoing, it is

ORDERED that the Court's January 25,1999, order is revoked. It is further

ORDERED that the petitioner's motion to expedite is denied as moot. It is further

ORDERED that the petitioner's request for extraordinary relief is denied.

DATED: FEB 11 1999 BY THE COURT:

/s/Kenneth B. Kramer
KENNETH B. KRAMER
Judge

Copies to:

J. Myers Morton, Esq.
Suite 620, One Centre Square
620 Market Street
Knoxville, TN 37902

General Counsel (027)
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

APPENDIX H

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 01-1233

[Dated September 4, 2001]

ELMER A. HAWKINS, PETITIONER,

v.

ANTHONY J. PRINCIPI, SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before KRAMER, *Chief Judge*.

ORDER

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

On July 19, 2001, the petitioner, through counsel, filed a petition for extraordinary relief in the nature of a writ of mandamus. In that petition, the petitioner complains, inter alia, that VA has failed to render a decision within a reasonable time on his claim for service connection for soft-tissue growths (claimed as

soft-tissue sarcomas and lipomas) claimed as residuals of Agent Orange exposure in service. Petition (Pet.) at 6. The petitioner further asserts that VA's unreasonable delay in rendering a decision on his claim entitles him to the writ that he is presently seeking from this Court. Pet. at 7. In addition, the petitioner asserts that, in responding to his previous petition for extraordinary relief, filed in July 1998, the Secretary "made a negligent misrepresentation to this [C]ourt that . . . resulted in [the] dismissal" of that previous petition. *Id.* As a remedy, the petitioner requests that the Court order VA to render a decision on his claim "within a definite and reasonable period of time" and that the Court retain jurisdiction over his claim until VA renders such a decision. Pet. at 1. The petitioner further requests that the Court sanction the Secretary for his alleged previous misrepresentation to this Court. Pet. at 1, 7. The petitioner has attached to his petition copies of several letters and Board of Veterans' Appeals (Board or BVA) decisions that he asserts support the petition.

According to those attachments, on October 24, 1990, the petitioner filed his claim for disability compensation benefits. Exhibit (Ex.) 7. On April 21, 1994, the Board remanded the petitioner's claim to a VA regional office (RO) for readjudication pursuant to newly established processing guidelines for Agent Orange claims and for the collection of any then-existing medical data in the petitioner's case. Ex. 8 at 2. In February 1996, the BVA denied the petitioner's claim as not well grounded. Ex. 9. The petitioner appealed the February 1996 BVA decision, and the Court granted the parties' joint motion for remand of his claim. Exs. 13, 14. In a February 19, 1997, decision, the Board remanded to the RO the

petitioner's claim for further evidentiary development, particularly with respect to a medical nexus opinion that had been provided by the petitioner's private physician. Ex. 10 at 5. The Board further stated that, if after such development the RO found that it still could not grant the petitioner's claim, the petitioner was to be afforded a special dermatological examination during which tissue samples of any fatty tissue tumors were to be obtained. *Id.* at 6. The Board instructed the RO to forward any such tissue samples to the BVA so that the BVA could then refer those tissue samples to the Armed Forces Institute of Pathology (AFIP) for analysis. *Id.*

The petitioner's exhibits further reflect that, in August 1998, he had filed with the Court a previous petition for extraordinary relief in which he, inter alia, requested that VA be ordered to afford him the special dermatological examination required by the February 1997 Board decision. Ex. 15 at 6. In February 1999, the Court denied that petition. Ex. 17. The Court's decision was based in part upon the Secretary's January 1999 Court-ordered response to the petition, in which the Secretary had informed the Court that the required tissue sample had been obtained and that the VA examination report form accompanying that tissue sample contained the routing instructions for such sample as prescribed in the February 1997 BVA decision (discussed above). Ex. 16 at 2. With respect to his previous petition and the Secretary's response thereto, the petitioner presently alleges that upon receipt by the RO of his tissue sample, the RO "deliberately [stuck that sample] in [his claims file]" and thus his tissue sample was not routed in accordance with those instructions. Pet. at 6.

In addition, copies of letters appended to the petition reflect that, from June to August 1999, the petitioner's attorney, on several occasions, requested of the RO and the BVA that he be provided with certain medical treatises and with the results of the analysis performed on the petitioner's tissue sample. Exs. 18-21. Finally, on April 30, 2001, the Board remanded the petitioner's claim to the RO for readjudication in light of the enactment of the Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 (Nov. 9, 2000) (VCAA). Ex. 12 at 2-3, 6. The Board further instructed that the RO was to undertake additional evidentiary development with respect to the petitioner's active military service and private medical treatment. Ex. 12 at 3-4, 5.

This Court has authority to issue extraordinary writs in aid of its jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651(a). *See Cox v. West,* 149 F.3d 1360 (Fed. Cir. 1998). However, "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. United States District Court,* 426 U.S. 394, 402 (1976). Before a court may issue a writ, a petitioner must demonstrate: (1) a clear and indisputable right to the writ and (2) a lack of adequate alternative means to obtain the relief sought. *See Erspamer v. Derwinski,* 1 Vet.App. 3, 9 (1990). A petitioner must satisfy both prongs in order to obtain extraordinary relief. *See Herrmann v. Brown,* 8 Vet.App. 60, 62 (1995) (applying *Kerr* "two-prong test"); *Erspamer, supra* (same). Although the Court understands the petitioner's frustration, "[t]he delay involved . . . must be unreasonable before a court will inject itself into an administrative agency's adjudicative process" and "[t]he mere passage of time in reviewing a matter does not necessarily constitute

the extraordinary circumstances requiring this Court to invoke its mandamus power." *Bullock v. Brown,* 7 Vet.App. 69, 69 (1994) (per curiam order).

In the instant case, the petitioner has not demonstrated a clear and indisputable right to a writ ordering VA to render a decision on his claim because he "has not demonstrated that the delay he complains of is so extraordinary . . . that the delay amounts to an arbitrary refusal to act, and not the product of a burdened system." *Costanza v. West,* 12 Vet.App. 133, 134 (1999) (per curiam order). Rather, the petitioner's own exhibits reflect that the Board had previously remanded his claim for further development in accordance with updated processing guidelines for Agent Orange claims; for development and clarification of his private physician's medical nexus opinion; and for completion of a special dermatological examination. The petitioner's exhibits further reflect, in part, that the RO has undertaken such development.

Further, in its April 2001 decision, the Board remanded the petitioner's claim for readjudication in light of the enactment of the VCAA. Ex. 12. *See Holliday v. Principi,* 14 Vet.App. 280, 282-83 (2001). The VCAA, inter alia, amended 38 U.S.C. § 5107(a) to eliminate the well-grounded-claim requirement. VCAA § 4. Pursuant to section 7(a)(2) of the VCAA, that amendment to section 5107(a) is applicable to "any claim . . . filed before the date of the enactment of [the VCAA] and not final as of that date." VCAA § 7(a). The VCAA also amended 38 U.S.C. § 5103 ("Notice to claimants of required information and evidence") and added 38 U.S.C. § 5103A ("Duty to assist claimants"). VCAA § 3(a). Moreover, in *Holliday,* the Court held

"that all provisions of the VCAA are potentially applicable to claims pending on the date of the VCAA's enactment." *Holliday,* 14 Vet.App. at 286, 290. In this regard, the Court notes that neither the RO nor the BVA, in any previous decisions, ever determined that the petitioner had submitted a well-grounded claim, so as to trigger VA's pre-VCAA duty to assist in development of that claim. In view of these new notice provisions and duty-to-assist provisions enacted in the VCAA, and considering the development required under the April 2001 and prior BVA remands, the Court concludes that VA's processing time does not constitute an unreasonable delay or an arbitrary refusal to act on the petitioner's claim.

In addition, as to a clear and indisputable right to a writ, the petitioner has not shown a substantive legal entitlement to the placement by this Court of a time limitation upon VA for rendering a decision on his claim. *See Dambach v. Principi,* 14 Vet.App. 307, 309 (2001) (per curiam order) (Court declined to set deadline for completion of BVA proceedings, noting that case would require further factual development on remand and that choosing an "arbitrary date without the slightest clue as to whether such a date was either reasonable or appropriate would be wrong"). The petitioner has similarly made no showing that he is entitled to the retention by this Court of jurisdiction over his claim until such time as the Board renders a decision on his claim. *See generally Cleary v. Brown,* 8 Vet.App. 305, 307-08 (1995) (Court found that it did not have authority to retain general and continuing jurisdiction over matter remanded to Board for new adjudication).

Moreover, the petitioner has not made any showing that he has exhausted his administrative remedies available through the RO and the BVA. *See Friscia v. Brown,* 8 Vet.App. 90, 91 (1995) (per curiam order) (petitioner not entitled to writ because he had not exhausted administrative remedies prior to filing petition for writ). In this regard, the petitioner's exhibits reflect that, although the petitioner, through counsel, has sent numerous letters to the RO and the BVA requesting copies of medical treatises and biopsy test results, those letters do not contain any request for more expeditious treatment of his claim, which is the relief that he seeks in the instant petition. In addition, to the extent that the petitioner may be seeking redress for any delay since the April 2001 BVA remand, his exhibits reflect that all of his letters predate that remand. *See Costanza,* 12 Vet.App. at 134 (petition for writ of mandamus denied in part because petitioner seeking redress for Board delay in rendering decision had not submitted any information as to letters, telephone calls, or visits to appropriate authorities or other efforts on his part to secure more prompt processing of his appeal). Under these circumstances, the Court concludes that the petitioner has not satisfied his burden of demonstrating a lack of adequate alternative means to obtain the relief sought. For that reason and for the reasons set forth above, the Court will deny the petition. However, the Court notes that, as of the date of the issuance of the instant order, the petitioner's claim for disability compensation benefits is almost 11 years old. Accordingly, in the event that the petitioner has not received a final administrative determination on the issue of service connection by January 1, 2002, he is free to file another petition.

With respect to the request for sanctions, this Court has previously stated that a "'finding that the conduct at issue constituted or was tantamount to bad faith is a precondition to imposing sanctions under the Court's inherent power.'" *Perry v. West,* 11 Vet.App. 319, 332 (1998) (quoting *Ebert v. Brown,* 4 Vet.App. 434, 437 (1993)). Moreover, the Court must "'take care to determine that the conduct at issue actually abused the judicial process.'" *Id.* (quoting *Jones (Joseph) v. Derwinski,* 1 Vet.App. 596, 607 (1991)). Here, the petitioner contends that the Secretary, in his January 1999 response to a previous petition, negligently misrepresented to the Court that, as required by the February 1997 BVA remand, his tissue sample would be referred to the AFIP for analysis. However, the petitioner's exhibits reflect that the Secretary informed the Court that a tissue sample had been obtained and that the examination report accompanying the tissue sample noted the proper routing instructions for that tissue sample, i.e., forward to the RO for referral to the AFIP. Ex. 16 at 2. After reviewing the petitioner's exhibits, the Court concludes that the Secretary did not make a negligent misrepresentation to this Court in his January 1999 Court-ordered response to the petitioner's previous petition. It appears that the petitioner's actual complaint is that VA failed to comply with the routing instructions prescribed by the February 1997 BVA remand; however, such compliance was not averred in the Secretary's January 1999 response. Rather, in his response, the Secretary stated only that such routing instructions were included with the petitioner's tissue sample. Thus, the petitioner's contention that VA deliberately failed to comply with those routing instructions is a mere allegation for which he provides no evidence. Given these circumstances, and upon

review of the petitioner's exhibits, the Court cannot conclude that the Secretary acted in bad faith or abused the judicial process with respect to this matter. Accordingly, the petitioner's request for sanctions must be denied.

On consideration of the foregoing, it is

ORDERED that the petition for extraordinary relief in the nature of a writ of mandamus is DENIED. It is further

ORDERED that the petitioner's request for sanctions is denied.

DATED: SEP 4 2001 BY THE COURT:

/s/Kenneth B. Kramer
KENNETH B. KRAMER
Chief Judge

Copies to:

J. Myers Morton, Esq.
One Centre Square, Suite 620
620 Market Street
Knoxville, TN 37902

General Counsel (027)
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

APPENDIX I

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 01-1359

[Dated September 20, 2001]

ELMER A. HAWKINS, APPELLANT,	)
	)
v.	)
	)
ANTHONY J. PRINCIPI,	)
SECRETARY OF VETERANS AFFAIRS,	)
APPELLEE.	)
	)

Before KRAMER, *Chief Judge*.

ORDER

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

On July 19, 2001, the appellant filed, through counsel, a Notice of Appeal (NOA) from an April 30, 2001, Board of Veterans' Appeals (Board or BVA) decision that remanded his claim to a VA regional office (RO) for readjudication in light of the enactment of the Veterans Claims Assistance Act of 2000, Pub. L.

No. 106-475, 114 Stat. 2096 (Nov. 9, 2000). The Court notes that, on that same date, the appellant also filed a petition for extraordinary relief in the nature of a writ of mandamus; he requested, inter alia, that the Court order VA to render a decision on his claim within a specified period of time. *See Hawkins v. Principi,* U.S. Vet.App. No. 01-1233 (ord. Sept. 4, 2001).

On August 20, 2001, the Secretary filed a motion to dismiss the instant appeal for lack of jurisdiction on the ground that the appellant has failed to exhaust his administrative remedies. In that motion, the Secretary asserts that, because the April 2001 Board decision remanded to the RO the appellant's claim, there is not a final BVA decision on the appellant's claim over which this Court has jurisdiction. On August 28, 2001, the appellant filed a response to the Secretary's motion to dismiss. In his response, the appellant asserts that his appeal should not be dismissed because the All Writs Act, 28 U.S.C. § 1651(a), is an "exception to the requirement that this [C]ourt only review final BVA decisions." Response at 1. On that same date, the Court also received the appellant's motion to consolidate the instant appeal with the proceedings regarding his July 19, 2001, petition for extraordinary relief, *see Hawkins, supra;* the appellant asserts that the two cases contain identical issues. For the reasons that follow, the Court will dismiss this appeal for lack of jurisdiction and will deny as moot the appellant's motion to consolidate.

Pursuant to 38 U.S.C. § 7266(a), in order for a claimant to obtain review of a BVA decision by this Court, that decision must be final and the person adversely affected by that decision must file a timely

NOA with the Court. *See Anglin v. West,* 11 Vet.App. 361, 363 (1998) (Court does not have jurisdiction to consider matter remanded by BVA to RO because there is no final BVA decision), *aff'd,* 203 F.3d 1343 (Fed. Cir. 2000); *see also In re Quigley,* 1 Vet.App. 1 (1990); 38 C.F.R. § 20.1100(b) (2000). In the instant appeal, the Board has not issued a final decision on the appellant's claim. Accordingly, the Court will grant the Secretary's motion and will dismiss this appeal for lack of jurisdiction. Moreover, in a September 4, 2001, single-judge order, the Court denied the July 2001 petition for extraordinary relief. *See Hawkins,* U.S. Vet. App. No. 01-1233. Given the disposition of the instant appeal and the disposition of the petition for extraordinary relief, the Court will deny as moot the appellant's August 28, 2001, motion to consolidate.

Upon consideration of the foregoing, it is

ORDERED that the Secretary's motion is granted and this appeal is DISMISSED for lack of jurisdiction. It is further

ORDERED that the appellant's August 28, 2001, motion to consolidate is denied as moot.

DATED: SEP 20 2001 BY THE COURT:

/s/Kenneth B. Kramer
KENNETH B. KRAMER
Chief Judge

Copies to:

J. Myers Morton, Esq.
One Centre Square, Suite 620
620 Market Street

Knoxville, TN 37902

General Counsel (027)
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

APPENDIX J

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 02-12

[Dated April 3, 2002]

ELMER A. HAWKINS, PETITIONER,	)
	)
v.	)
	)
ANTHONY J. PRINCIPI,	)
SECRETARY OF VETERANS AFFAIRS,	)
RESPONDENT.	)
	)

Before KRAMER, *Chief Judge*.

ORDER

Note: Pursuant to US. Vet. App. R. 30(a), this action may not be cited as precedent.

In a September 4, 2001, single-judge order, the Court denied the petitioner's July 2001 petition for extraordinary relief in the nature of a writ of mandamus in which he had requested, inter alia, that the Court order VA to render a decision on his claim within a specified period of time and that the Court

retain jurisdiction over his claim until VA had rendered such a decision. *Hawkins v. Principi,* U.S. Vet. App. No. 01-1233 (ord. Sept.4, 2001). The Court denied the petitioner's July 2001 petition because he had failed to demonstrate a clear and indisputable right to such a writ and because he had failed to make a showing that he had exhausted his administrative remedies. *See Erspamer v. Derwinski,* 1 Vet.App. 3, 9 (1990). The Court, however, did note that, at the time of its September 2001 order, the petitioner's claim was almost 11 years old and stated that, if the petitioner had not obtained a final administrative determination on the issue of service connection by January 1, 2002, he was free to file another petition. *Hawkins,* U.S. Vet. App. No. 01-1233.

On January 7, 2002, the petitioner, through counsel, filed a petition for extraordinary relief in the nature of a writ of mandamus. In that petition, the petitioner complains, inter alia, that VA has failed to render a decision within a reasonable time on his claim for service connection for soft-tissue growths (claimed as soft-tissue sarcomas and lipomas) claimed as residuals of Agent Orange exposure in service. Petition (Pet.) at 6. The petitioner further asserts that VA's unreasonable delay in rendering a decision on his claim entitles him to the writ that he is presently seeking from this Court. Pet. at 7. In addition, the petitioner avers in essence that he was not provided with a final administrative determination on the issue of service connection by January 1, 2002, and that he thus is filing the instant petition, as the Court had stated previously that he was free to do. *Id.* The petitioner requests as a remedy that the Court either award him service connection for his condition (Item 1) or order VA to render a decision on his claim "within

a definite and *immediate* period of time" and retain jurisdiction over his claim until VA renders such a decision (Item 2). Pet. at 1. The petitioner has attached to his petition copies of several letters and Board of Veterans' Appeals (Board or BVA) decisions that, he asserts, support the petition. On January 31, 2002, the Court ordered the Secretary to answer the petition for extraordinary relief.

Prior to the Secretary answering the petition, the petitioner, on February 15, 2002, filed a motion to amend his petition for extraordinary relief. On that same date, the Court received the petitioner's amended petition. In those pleadings, the petitioner initially acknowledges that, on February 7, 2002, a VA regional office (RO) denied his claim and issued to him a Supplemental Statement of the Case (SSOC), a copy of which he has attached to his amended petition. Motion (Mot.) at 2; Amended Pet. at 7; *see* Amended Pet. Exhibit (Ex.) 32 at 4. The petitioner thus requests as an amended remedy that the Court, inter alia, order VA to render a decision on his claim "that is appealable to this [C]ourt" (Item 3). Mot. at 2; Amended Pet. at 1.

On February 26, 2002, the Secretary, pursuant to the Court's January 2002 order, filed a response to the petition for extraordinary relief. The Secretary's response, accompanied by a confirming exhibit, advises that, on February 7, 2002, the RO denied the petitioner's claim and issued an SSOC. Response (Resp.) at 2; *see* Resp. Ex. at 4. The Secretary argues that, because the RO has taken the action initially sought by the petitioner, because the time involved in adjudicating the petitioner's claim has not been unreasonable, and because a writ of mandamus should

not be utilized to bypass VA adjudication procedures and seek a direct appeal of the RO's decision to this Court, the petitioner has not demonstrated either a clear and indisputable right to the writ or the lack of an administrative remedy. Resp. at 2-3. The Secretary thus requests that, because the RO has issued a decision on the petitioner's claim, the Court dismiss as moot the petition for extraordinary relief. Resp. at 3. The Secretary, on February 28, 2002, filed a response in opposition to the petitioner's motion to amend his petition for extraordinary relief. In that response, the Secretary, inter alia, argues that the petitioner has not shown that he lacks an administrative remedy in his case. Resp. in Opposition at 2. On March 15, 2002, the petitioner filed a pleading in reply to the Secretary's February 26, 2002, response to the petitioner's petition for extraordinary relief; he in essence reiterates the arguments that he had raised in his February 15, 2002, motion to amend his petition for extraordinary relief.

This Court has authority to issue extraordinary writs in aid of its jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651(a). *See Cox v. West,* 149 F.3d 1360 (Fed. Cir. 1998). However, "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. United States District Court,* 426 U.S. 394, 402 (1976). Before a court may issue a writ, a petitioner must demonstrate (1) a clear and indisputable right to the writ and (2) a lack of adequate alternative means to obtain the relief sought. *See Erspamer,* 1 Vet.App. at 9. A petitioner must satisfy both prongs in order to obtain extraordinary relief. *See Herrmann v. Brown,* 8 Vet.App. 60, 62 (1995) (applying *Kerr* "two-prong test"); *Erspamer, supra* (same).

Moreover, this Court has adopted the jurisdictional restrictions of the case-or-controversy rubric under Article III of the United States Constitution. *See Aronson v. Brown,* 7 Vet.App. 153, 155 (1994); *Mokal v. Derwinski,* 1 Vet.App. 12, 13 (1990). When the relief sought by a petition has been accomplished, the appropriate course of action is for the Court to dismiss the petition as moot. *See Thomas v. Brown,* 9 Vet.App. 269, 270 (1996) (per curiam order); *Bond v. Derwinski,* 2 Vet.App. 376, 377 (1992) (per curiam order) (Court lacks jurisdiction when there is no case or controversy or when once live case or controversy becomes moot); *Mokal,* 1 Vet.App. at 15 (Court dismissed portion of petition seeking mandamus relief because controversy surrounding that portion of petition was moot).

With respect to Item 1, the petitioner has not demonstrated a clear and indisputable right to a writ ordering the Secretary to award service connection because he has not shown a substantive legal entitlement to service connection for his claimed condition. In this regard, the petitioner, contrary to his assertions, has not provided any evidence that his claimed condition is eligible for presumptive service connection or that his claimed condition was incurred in or aggravated by his active military service. *See Costanza v. West,* 12 Vet.App. 133, 134 (1999) (per curiam order) ("[a] bald assertion . . . does not establish the requisite factual basis upon which this Court will grant mandamus nor does it demonstrate a clear and indisputable right to extraordinary relief"); *see also* 38 C.F.R. §§ 3.303 (2001) (discussing general requirements for service connection), 3.307 (discussing general requirements for presumptive service connection), 3.309(e) (diseases associated with exposure to certain herbicide agents and thus subject

to presumptive service connection). Although the Court is sympathetic to the petitioner's situation, even assuming that the Court would have jurisdiction were the evidence sufficient, the Court is without evidence to make any finding that he is clearly and indisputably entitled to service connection for his claimed condition. *See* 38 U.S.C. §§ 1110, 1112; 38 C.F.R. §§ 3.303, 3.307, 3.309(e). Therefore, the Court will deny the petitioner's petition with respect to Item 1.

With respect to Item 2, because the RO, on February 7, 2002, denied the petitioner's claim and issued to him an SSOC, that portion of the petition is moot and will be dismissed. *See Mokal, supra.* With respect to Item 3, even assuming that the petitioner could demonstrate a clear and indisputable right to a writ ordering the Board to render a final decision on his claim, he has not made any showing that he has exhausted his administrative remedies available through the BVA. *See Friscia v. Brown,* 8 Vet.App. 90, 91 (1995) (per curiam order) (petitioner not entitled to writ because he had not exhausted administrative remedies prior to filing petition for writ). In this regard, the Court notes that it appears that, subsequent to the RO's denial of his claim and issuance of an SSOC, the petitioner has not taken any steps to pursue an appeal to the Board. In addition, the petitioner has not submitted any information as to letters, telephone calls, or visits to appropriate authorities or other efforts on his part to secure a more prompt processing of his appeal. *See Costanza, supra.* In this regard, the Court notes that, in the cover letter attached to the SSOC, the RO informed the petitioner that, upon his notification that he had no additional comments to present, his appeal could be forwarded to the Board without waiting for the customary 60-day

response period to expire. The Court further notes that there is no evidence that the petitioner has so informed the RO. The Court thus will deny the petitioner's amended petition with respect to Item 3. *See Friscia, supra.*

On consideration of the foregoing, it is

ORDERED that the January 7, 2002, petition for extraordinary relief in the nature of a writ of mandamus with respect to Item 1 is DENIED. It is further

ORDERED that the January 7, 2002, petition for extraordinary relief in the nature of a writ of mandamus with respect to Item 2 is DISMISSED as moot. It is further

ORDERED that the petitioner's February 15, 2002, motion to amend his petition for extraordinary relief is granted. The amended petition for extraordinary relief in the nature of a writ of mandamus will be filed as of the date that it was received. It is further

ORDERED that the amended petition for extraordinary relief in the nature of a writ of mandamus with respect to Item 3 is DENIED.

DATED: APR 3 2002 BY THE COURT:

/s/Kenneth B. Kramer
KENNETH B. KRAMER
Chief Judge

Copies to:

J. Myers Morton, Esq.

One Centre Square, Suite #620
620 Market Street
Knoxville, TN 37902

General Counsel (027)
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

APPENDIX K

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 02-1578

[Dated March 2, 2006]

ELMER A. HAWKINS, APPELLANT,
v.
R. JAMES NICHOLSON, SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before HAGEL, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

HAGEL, *Judge*: Elmer A. Hawkins appeals through counsel a September 6, 2002, decision of the Board of Veterans' Appeals (Board) wherein the Board denied his claim for service connection for benign soft-tissue growths, claimed as soft-tissue growths, claimed as residuals of exposure to Agent Orange during service.

Record (R.) at 3, 16. The Court has jurisdiction pursuant to 38 U.S.C. §§ 7252(a) and 7266(a) to review that Board decision. A single judge may conduct that review. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons provided in this decision, the Court will vacate the decision on appeal with respect to the Board's determination regarding service connection on a direct basis. That matter will be remanded to the Board for readjudication consistent with this decision. The Court will affirm the decision on appeal with respect to the Board's determination regarding service connection on a presumptive basis.

I. FACTS

Mr. Hawkins served on active duty in the U.S. Navy from May 1966 to May 1968, including combat service in Vietnam for which he received, among other awards, the Purple Heart Medal. R. at 170, 181. The record contains ample evidence, and the Secretary acknowledges, that "from the 1970s to the present, [he] was treated for recurring benign skin growths, variously called lipomas[1], tumors[2], fibromas[3], fibrous

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[1] A "lipoma" is "a benign, soft, rubbery, encapsulated tumor of adipose tissue, usually composed of mature fat cells." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 448 (28th ed. 1994) (hereinafter DORLAND'S).

[2] A "tumor" is "a new growth of tissue in which the multiplication of cells is uncontrolled and progressive." *Id* at 1761.

[3] A "fibroma" is "a tumor composed mainly of fibrous or fully developed connective tissue." *Id* at 627.

cysts[4], [and] nodules[5]." Secretary's Brief (Br.) at 2. For instance, in 1976, he had a cyst removed from his throat. R. at 47. In 1984, he had three subcutaneous lipomas removed from his abdominal wall. R. at 71. Two years later, a cystic lesion was removed from his neck. R. at 64. In October 1990, he filed with a VA regional office a claim for service connection for "[e]xposure to Agent Orange"; a decision on that claim was deferred pending receipt by the regional office of finalized regulations relating to residuals of exposure to Agent Orange. R. at 42, 220.

In a letter dated in January 1992, Mr. Hawkins's private doctor, Carlos Velado, asserted that he had "reviewed the literature supplied [to him] on the side effects of Agent Orange" and that, in his opinion, Mr. Hawkins's case "seems to be a typical case of soft[-]tissue tumors which include lipoma[s] and sarcomas." R. at 278. In an April 1992 letter, Dr. Velado opined that in his "professional and medical opinion, . . . the occurr[e]nce and recurr[e]nce of these tumors and lymphnodes are a result of this patient's exposure to Agent Orange during his stay in Vietnam." R. at 156. In a February 1993 letter, Dr. Velado noted that Mr. Hawkins had retired from his job due to disabilities and opined as follows: "I feel that this is a direct result of his multiple surgeries and his contact with Agent Orange." R. at 235. Finally, in an August 1993 letter, Dr. Velado stated that he had been a

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[4] A "fibrous cyst" is a "closed cavity or sac [composed of or containing fibers] . . . lined by epithelium, . . . especially one that contains a liquid." *Id* at 417, 629.

[5] A "nodule" is "a small boss or node which is solid and can be detected by touch." *Id* at 1144.

general surgeon for twenty-one years and had "never seen fatty tumors grow this fast." R. at 323. On that basis, he opined that he felt "that it was due to [Mr. Hawkins's] exposure to Agent Orange." *Id.* The regional office, in September 1994, denied Mr. Hawkins service connection for soft-tissue sarcomas and lipomas secondary to Agent-Orange exposure. R. at 346-47. In so doing, the regional office concluded that the evidence failed to reflect that he had soft-tissue sarcomas and observed that lipomas are not a condition for which entitlement to service connection is warranted on a presumptive basis. R. at 346. That decision was appealed to the Board, and the Board subsequently requested that the claims file and some tissue slides "be forwarded to the Armed Forces Institute of Pathology for review" to determine "the pathologic diagnosis of the tissue samples" and for an opinion as to whether there is a relationship between that diagnosis and any of the conditions on the list for which presumptive service connection for will be awarded. R. at 331.

Dr. Nelson S. Irey, Chairman of the Department of Environmental and Toxicologic Pathology at the Armed Forces Institute of Pathology responded to the Board's request in August 1995. With respect to the pathologic diagnosis of Mr. Hawkins's tissue samples, Dr. Irey opined that he had found "3 lipomas, 3 angiolipomas[6][,] and 5 dermatofibromas[7] (fibrous histiocytomas)." R. at 364. In response to the Board's

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[6] An "angiolipoma" is "a lipoma containing clusters of thin-walled proliferating blood vessels." DORLAND'S at 79.

[7] A "dermatofibroma" is "a benign, circumscribed erythematous to brown nodular neoplasm occurring in the dermis." *Id.* at 448.

question regarding a relationship between that diagnosis and any of the conditions on the list for presumptive service connection, Dr. Irey opined that "none of the diagnoses made on this patient appear on the list of disorders for which entitlement is granted for service connection." *Id.* Dr. Irey then noted as follows: "It is germane to this case to note that in a reported series of more than one-thousand cases of Vietnam veterans, the incidence of lipomas was 5.98%, and there was an incidence of 5.5% of lipomas in a control group of non-Vietnam veterans." R. at 365.

In February 1996, the Board denied Mr. Hawkins's claim; he appealed that decision to the Court, and the Court later granted a joint motion for remand. *See* R. at 401, 403-416. The Board subsequently remanded the matter to the regional office for further development. R. at 479-80. In a January 1997 letter, Dr. Velado asserted that it was his "100% . . . belie[f]" that Mr. Hawkins's lipomas "are directly caused by his exposure to Agent Orange." R. at 449. Mr. Hawkins underwent a VA skin-diseases examination in September 1998. In his report, the examiner, Dr. Robert C. Griffith, noted that Mr. Hawkins had "a letter from Dr. Carlos Velado stating that he should be totally disabled due to Agent Orange induced soft[-]tissue tumors." R. at 530. After examining Mr. Hawkins, Dr. Griffith found "soft[-]tissue skin lesions and . . . some benign skin lesions." R. at 532. Regarding a relationship between exposure to Agent Orange and Mr. Hawkins's condition, he opined as follows: "I know of no reference to the formation of lipomas, angiolipomas, or dermatofibromas in association with Agent Orange exposure." *Id.* He then went on to note that he had "several other patients who have numerous angiolipomas and lipomas with no

exposure to toxic chemicals of any kind" and that he did not feel that Mr. Hawkins's "situation is significantly out of the ordinary." *Id.* Finally, Dr. Griffith noted that "[i]t would be a good idea for [Mr. Hawkins] to be evaluated by a[u]rologist for possible Peyronie's." *Id.* A VA report of contact form dated in October 1998 reflects the regional office's opinion that Dr. Griffith's examination was "insufficient for rating purposes because . . . Dr. Griffith did not obtain any tissue samples and indicated that the veteran should be examined by a urologist." R. at 542.

In a December 1998 letter, Dr. Velado reiterated his opinion that Mr. Hawkins's condition is related to Agent-Orange exposure. R. at 620. In September 1999, the Board requested another medical opinion from the Armed Forces Institute of Pathology to determine "whether the veteran's soft-tissue growths are related to soft-tissue sarcoma or ***whether they were caused by the veteran's exposure to chemical dioxins.***" R. at 731 (emphasis added). The resulting November 1999 medical report was authored by Dr. Michael R. Lewin-Smith, Staff Pathologist at the Department of Environmental and Toxicologic Pathology and Dr. Florabel G. Mullick, Acting Chair of that department. R. at 787. In response to the Board's first request, they opined unequivocally that Mr. Hawkins's conditions could not be classified as soft-tissue sarcomas. R. at 786. In response to the Board's second request, however, no direct answer was provided–they merely repeated verbatim Dr. Irey's previous observation that " 'in a reported series of more than one-thousand cases of Vietnam veterans, the incidence of lipomas was 5.98%, and there was an incidence of 5.5% of lipomas in a control group of non-Vietnam veterans.'" R. at 787 (quoting R. at 365). Next, they noted that, "[a]lthough

in the same study dermatofibromas occurred with greater frequency in the Vietnam group, it was indicated that they [ ]are common and benign and do not have prognostic importance[ ]." R. at 787. After much procedure, including additional Board remands, the claim eventually made its way back to the Board and was the subject of the decision on appeal.

In that decision, the Board denied Mr. Hawkins's claim for service connection for benign soft-tissue growths, claimed as soft-tissue growths, claimed as residuals of exposure to Agent Orange during service. R. at 3, 16. In so doing, the Board acknowledged that Mr. Hawkins had served in Vietnam and that "he is presumed to have been exposed during such service to . . . Agent Orange." R. at 11. The Board then observed that Mr. Hawkins claimed entitlement to service connection on a presumptive basis for a soft-tissue sarcoma and concluded that "the totality of the medical evidence of record reveals that the veteran does not have a soft-tissue sarcoma, which is a malignant tumor." R. at 12. Next, the Board concluded that "the evidence of record shows that the veteran has lipomas, angiolipomas, and dermatofibromas" and that "[t]he medical opinion of the Armed Forces Institute of Pathology is that these are benign growths that are not soft-tissue sarcomas." *Id.* Addressing Dr. Velado's January 1992 letter, in which he had noted that Mr. Hawkins's tumors included sarcomas, the Board concluded that "there is no pathological or clinical evidence of record showing that the veteran has a soft[-]tissue sarcoma." *Id.* Later in its decision, the Board addressed and denied service connection on a direct basis. R. at 14-16. With respect to the "multiple letters" submitted by Dr. Velado on Mr. Hawkins's behalf, the Board concluded that "this is still only the

opinion of a single physician" and that "we have reason to doubt this physician's opinion as to the etiology of the veteran's disorders because at times he has indicated that the veteran has sarcoma, which is not []supported by the pathology evidence of record." R. at 15-16. The Board ultimately concluded that "[t]he fact is that there is a single medical opinion that relates the veteran's disorders to Agent Orange exposure, while there are four opinions indicating that the disorders are unrelated to Agent Orange exposure in service" and that "the preponderance of the evidence is against the claim for service connection on a direct basis." R. at 16.

On appeal, Mr. Hawkins seeks reversal, contending that the Board erred and that he is entitled to service connection for his condition on both direct and presumptive bases. Appellant's Br. at 21. He contends that none of the medical evidence against his claim could have been properly relied on by the Board and that Dr. Velado's opinion should entitle him to service connection. *See id.* at 25-30. Regarding the first opinion of the Armed Forces Institute of Pathology, he contends that that opinion did not address service connection on a direct basis and that the Board "failed to advise [him] of any rights to respond to this opinion by incorrectly mailing notice to the wrong address." *Id.* at 26. Specifically, he argues that VA failed to comply with the Court's holding in *Thurber v. Brown*, 5 Vet. App. 119 (1993), by not providing him a chance to comment on that medical opinion. *Id.* Later, he "admits that despite the notice breakdown, he [later] submitted . . . an additional opinion that he contends refutes this . . . first opinion." *Id.* With respect to Dr. Griffith's opinion, he contends that "Dr. Griffith took no tissue samples" and appears to contend that that

opinion was equivocal. *Id.* at 27. He also argues that he did not receive proper notice of that opinion but that "[e]ven so, he filed Dr. Velado's seventh opinion in response." *Id.* Addressing the November 1999 medical report, he argues that the Board's letter of engagement was inaccurate because, among other things, it omitted an opinion of Dr. Velado, omitted his pathological reports, and "inaccurately quote[d] and mischaracterize[d]" his letters. *Id.* He also argues that the tissue samples were "[p]oison[ed]" because they "stayed in [a] file on someone's desk for over nine . . . months." *Id.* He then points out that Dr. Velado mentioned the susceptibility of the tissue samples in his subsequent letter. *Id* . at 28. His final argument for direct service connection appears to be that the Court's decision in *Mariano v. Principi,* 17 Vet.App 305 (2003) should operate to prevent the Board from undertaking the development that it undertook in this case because the Board's sole purpose was to obtain evidence adverse to his claim. *Id.* at 29-30. His sole argument for service connection on a presumptive basis is that VA regulations allow for presumptive service connection for soft-tissue sarcomas, which include "[d]ermatofibrosarcoma protuberans." *Id.* at 30. He contends that the evidence of record indicates the he "was found to have "[d]ermatofibrosarcoma protuberans." *Id.*

In response, the Secretary argues that the Board's decision is not clearly erroneous and should be affirmed. Secretary's Br. at 6. He argues that "[a]ll of the several pathology reports clearly support" the Board's findings that Mr. Hawkins has "benign soft[-]tissue tumors, not any type of malignant tumor that might warrant service connection on a presumptive basis." *Id.* In response to Mr. Hawkins's

last argument–that he is entitled to service connection on a presumptive basis–the Secretary asserts that Mr. Hawkins has never been diagnosed as having "dermatofibrosarcoma protuberans" and that Mr. Hawkins and his attorney lack the competence to render such a diagnosis. *Id.* at 7. In response to Mr. Hawkins's arguments for service connection on a direct basis, the Secretary argues that the Board's finding that the evidence against the claim outweighs the evidence in favor of it is entitled to deference. *See id.* at 8-10. Next, the Secretary points out that "[r]eversal may be an appropriate remedy only when the Board's decision has absolutely no plausible basis, and all the evidence is uncontroverted and in the claimant's favor." *Id.* at 9. Finally, responding to the argument that the Board ordered development for the purpose of obtaining evidence adverse to the claim, the Secretary argues that "it is the complexity of the medical issues that has caused the Board to exercise its discretion to develop the evidence in this case." *Id.* at 10.

II. ANALYSIS

A. Applicable Law

Service connection for purposes of VA disability compensation will be awarded to a veteran on a direct basis when the record before the Secretary contains (1) a medical diagnosis of a current disability, (2) medical evidence of incurrence or aggravation of a disease or injury in service, and (3) medical evidence of a nexus between the in-service injury or disease and the current disability. *See* 38 U.S.C. § 1110; *Duenas v. Principi,* 18 Vet.App. 512, 519 (2004); 38 C.F.R. § 3.303 (2005). In addition to establishing entitlement to service connection on a direct basis, a veteran may

establish entitlement to service connection on a presumptive basis. For example, a veteran who served on active duty in Vietnam between January 9, 1962, and May 7, 1975, is entitled to a rebuttable presumption of exposure to Agent Orange. *See* 38 C.F.R. § 3.307(a)(6)(iii) (2005). Pursuant to 38 U.S.C. § 1116 and 38 C.F.R. § 3.309(e) (2005), such a veteran is entitled to presumptive service connection if he or she incurs any of the diseases set forth in the regulation, even though there is no record of such disease during service and provided that the requirements of 38 C.F.R. § 3.307(a)(6) are satisfied. The chronic diseases for which presumptive service connection is warranted include "soft[-]tissue sarcoma." 38 C.F.R. § 3.309(e).

B. Service Connection on a Presumptive Basis

Here, Mr. Hawkins's sole argument for entitlement to service connection on a preseumptive basis is that VA regulations allow for presumptive service connection for soft-tissue sarcomas, which include "[d]ermatofibrosarcoma protuberans" and that the evidence of record indicates that he "was found to have "[d]ermatofibrosarcoma protuberans." Appellant's Br. at 30. Dermatofibrosarcoma protuberans" is defined as "a relatively uncommon soft tissue neoplasm with intermediate-to-low grade malignancy." *See* Chih-Shan Jason Chen, MD, PhD, *Dermatofibrosarcoma Protuberans,* emedicine, http://www.emedicine .com/derm/topic97 (as visited Jan. 22, 2006); *see also* DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 448 (28th ed.1994). In the United States, it "constitutes less than 0.1% of all malignant neoplasms and approximately 1% of all soft tissue sarcomas." *See* Chih-Shan Jason Chen, MD, PhD,

Dermatofibrosarcoma Protuberans, supra. Although Mr. Hawkins is correct that the regulation recognizes this rare form of tumor as a type of soft-tissue sarcoma for which presumptive service connection can be awarded, he is mistaken in his assertion that the record reflects that he suffers from that particular condition. Nothing in the record on appeal reflects that he has ever been diagnosed as having that particular condition by any doctor, including Dr. Velado. As a consequence, the Court will affirm the Board's decision to deny service connection on a presumptive basis.

C. Service Connection on a Direct Basis

As an initial matter, the Court notes that the Secretary is incorrect in his assertion that the Court can reverse a Board finding of fact only if "the evidence is uncontroverted and in the claimant's favor." Secretary's Br. at 9. To the contrary, this Court can reverse a Board finding of fact whenever it "is left with a definite and firm conviction that a mistake has been committed." *Hersey v. Derwinski,* 2 Vet.App. 91, 94 (1992) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). The Court may not substitute its judgment for the factual determinations of the Board on issues of material fact merely because the Court would have decided those issues differently in the first instance. *See id.* Vacatur and remand may be warranted where the Board has failed to provide an adequate statement of reasons or bases for its determinations or where the record is inadequate. *See Tucker v. West,* 11 Vet.App. 369, 374 (1998). That said, for reasons provided below, the Court is convinced that the Board erred in denying Mr. Hawkins direct service connection. As will be explained, the Court is also convinced that reversal is

not appropriate and that the appropriate remedy in this case is vacatur and remand.

Here, the Board acknowledged the multiple letters of Dr. Velado in favor of Mr. Hawkins's claim but expressed doubt as to Dr. Velado's opinions in light of the fact that he had noted that Mr. Hawkins's tumors included sarcomas–a finding that was not supported by the tissue-sample testing conducted by the Armed Forces Institute of Pathology or by the opinion of Dr. Griffith. *See* R. at 15-16. On that basis, the Board discounted the probative value of Dr. Velado's opinion regarding service connection on a direct basis. *See id.* Then, discussing the "evidence against the veteran's claim," the Board concluded as follows:

> The evidence against the veteran's claim consists of medical opinions of four physicians. Three physicians from the Armed Forces Institute of Pathology and the physician who conducted that 1998 VA medical examination were all of the opinion that the veteran's current lipomas, angiolipomas, and benign dermatofibromas were not related to his Agent Orange exposure in service.

R. at 16.

That terse conclusion constitutes remandable error because in neither of the two Armed Forces Institute of Pathology reports did any of the three physicians render an opinion as to whether Mr. Hawkins's lipomas "***were caused by . . . exposure to chemical dioxins.***" R. at 731 (emphasis added); *see Stegall v. West,* 11 Vet.App. 268, 271 (1998) ("[A] remand by this Court or the Board confers on the . . . claimant, as a

matter of law, the right to compliance with the remand orders."). Dr. Irey was only called upon to address whether Mr. Hawkins's condition could be found on the list of conditions which are eligible for service connection on a presumptive basis. R. at 331. After concluding that it could not, Dr. Irey went on to note a statistic that can be viewed as relevant to determining whether Mr. Hawkins's lipomas were caused by exposure to Agent Orange. R. at 365. At no time, however, did Dr. Irey render an opinion as to whether Mr. Hawkins's lipomas were caused by exposure to Agent Orange, nor did he opine regarding the statistical significance of the fact that the Vietnam veterans showed a higher incidence of lipomas than did non-Vietnam veterans. *See* R. at 364-65. As a consequence, the Board erred when it characterized Dr. Irey's report containing that statistical notation as evidence against Mr. Hawkins's claim for service connection on a direct basis. To make matters worse, the record reflects no medical evidence to explain why that statistical notation, which reflects a higher incidence of lipomas in Vietnam veterans than in non-Vietnam veterans, is evidence against the claim and not in support of it.

The second Armed Forces Institute of Pathology report is similarly defective. That report, which was prepared by Drs. Lewis-Smith and Mullick in response to a Board order that required an opinion as to whether Mr. Hawkins's lipomas "***were caused by . . . exposure to chemical dioxins,***" echoed Dr. Irey's previous observation that "'in a reported series of more than one-thousand cases of Vietnam veterans, the incidence of lipomas was 5.98%, and there was an incidence of 5.5% of lipomas in a control group of non-Vietnam veterans.'" R. at 787 (quoting R. at 365).

The only analysis provided was a subsequent notation by Drs. Lewis-Smith and Mullick that "[a]lthough in the same study ***dermatofibromas*** occurred with greater frequency in the Vietnam group, it was indicated that they [ ]are common and benign and do no have prognostic importance[ ]." R. at 787(emphasis added). Thus, although it appears that Drs. Lewis-Smith and Mullick may have obliquely concluded that a higher incidence of ***dermatofibromas*** in the group of Vietnam veterans was not statistically significant, they never rendered an opinion–in compliance with the Board's September 1999 order–as to whether Mr. Hawkins's ***lipomas*** were caused by his exposure to Agent Orange. *See* R. at 731; *see also Stegall,* 11 Vet.App. at 271. As a consequence, the Board erred in concluding that that report is evidence against Mr. Hawkins's claim for service connection on a direct basis. Finally, with respect to Dr. Griffith's report, the Board failed to recognize, as the regional office properly had, that Dr. Griffith had failed to obtain and analyze tissue samples as the Board had required in its February 1997 decision. R. at 480, 542. The Board also failed to recognize and discuss the fact that the regional office had disregarded that report as inadequate for rating purposes. R, at 542.

In short, all three of the reports on which the Board relied in denying service connection on a direct basis are suspect. Nevertheless, because the Board did not err when it questioned the probative value of Dr. Velado's opinions, the Court is not left with a "definite and firm conviction" that the Board erred in denying Mr. Hawkins's claim for service connection on a direct basis and will not accept Mr. Hawkins's invitation to reverse the decision on appeal. *See Hersey,* 2 Vet.App.

at 94. In that regard, the Court notes that the Board acted within its discretion when it concluded that Dr. Velado's reports warrant diminished probative value because they contain unsubstantiated reports of sarcoma. *Wood v. Derwinski*, 1 Vet.App.190, 193 (1991) ("The B[oard] has the duty to assess the credibility and weight to be given to the evidence."). As a consequence, the Court will vacate the decision on appeal with respect to the Board's determination regarding service connection on a direct basis and will remand that matter. On remand, VA is directed to provide Mr. Hawkins with a medical examination or obtain a medical opinion regarding the possible nexus between his presumed exposure to Agent Orange and his lipomas. *See* 38 U.S.C. § 5103A(d)(1) (providing that the Secretary's duty to assist a claimant includes, among other things, "obtaining a medical opinion when such an . . . opinion is necessary to make a decision on the claim"). Any examination report or opinion obtained must include a discussion addressing the significance of the statistics regarding lipomas in Vietnam and non-Vietnam veterans that were cited by Drs. Irey, Lewis-Smith, and Mullick in their reports.

Finally, notwithstanding the foregoing, the Court notes that Mr. Hawkins's *Thurber* arguments are without merit because, even assuming that his assertions of error are correct, by his own admission any such errors were rendered nonprejudicial when he submitted additional evidence in support of his claim and against the VA-generated medical evidence. *See* Appellant's Br. at 27; *see also* 38 U.S.C. § 7261(b); *Conway v. Principi*, 353 F.3d 1369, 1374-75 (Fed. Cir. 2004). In addition, his argument based on *Mariano*–that the Court's decision in that case should operate to bar the Board from undertaking the

development that it undertook in this case because the Board's sole purpose was to obtain evidence adverse to his claim–lacks merit as well. Contrary to Mr. Hawkins's assertion, *Mariano* requires only "an adequate statement of reasons or bases for [the Board's] decision to pursue further development where such development ***reasonably could be construed*** as obtaining additional evidence" for the purpose of denying a claim. 17 Vet.App. at 312 (emphasis added). Here, the Court agrees with the Secretary that the Board had discretion to develop additional evidence because of the complexity of the issues involved. *See Shoffner v. Principi*, 16 Vet.App. 208, 213 (2002) (holding that VA has discretion to decide when additional development is necessary); 38 C.F.R. § 3.304(c) ("The development of evidence in connection with claims for service connection will be accomplished when deemed necessary but it should not be undertaken when evidence present is sufficient for this determination."); *see also* 38 U.S.C. § 7109(a) ("When, in the judgment of the Board, expert medical opinion, in addition to that available within the Department, is warranted by the medical complexity or controversy involved in an appeal case, the Board may secure an advisory medial opinion from one or more independent medical experts who are not employees of the Department.").

III. CONCLUSION

On consideration of the foregoing, the September 2002 Board decision on appeal is VACATED with respect to the Board's determination regarding service connection on a direct basis. That matter is REMANDED to the Board for readjudication consistent with this decision. The Board's decision is

AFFIRMED with respect to the Board's denial of service connection on a presumptive basis.

DATED: MAR 2 2006

Copies to:

J. Myers Morton, Esq.
VA General Counsel (027)

APPENDIX L

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 08-2832

[Dated November 7, 2008]

ELMER A. HAWKINS, PETITIONER,
v.
JAMES B. PEAKE, M.D., SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before FARLEY, *Judge*.

ORDER

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

On September 2, 2008, the appellant filed a Notice of Appeal (NOA) from an August 25, 2008, Board of Veterans' Appeals (BVA or Board) decision. On October 15, 2008, the appellant, through counsel, filed a motion to consolidate the instant appeal with Docket No. 08-2336, asserting that this appeal goes hand and

hand with his writ of mandamus pending before the Court. On October 16, 2008, the Secretary filed a motion in opposition to appellant's motion to consolidate. The Secretary also moved to dismiss this instant appeal for lack of jurisdiction, asserting that the appellant had failed to exhaust his administrative remedies. The Secretary reports that the BVA, in its August 25, 2008, decision remanded the appellant's claim to the Appeals Management Center in Washington, D.C., for further consideration and development.

Pursuant to 38 U.S.C. § 7266(a), in order for a claimant to obtain review of a BVA decision by this Court, that decision must be final and the person adversely affected by that decision must file an NOA within 120 days after the date on which the BVA decision was mailed. *In re Quigley*, 1 Vet.App. 1 (1990). Because a final decision has not been issued by the BVA with respect to the claim that was remanded by the Board, the Court does not have jurisdiction to review this appeal. *Hampton v. Gober*, 10 Vet.App. 481, 483 (1997). If and when a final Board decision is issued on remand, any matter determined in such a decision may be appealed to this Court. *Matthews v. Principi*, 15 Vet.App. 138 (2001) (per curiam order).

Upon consideration of the foregoing, it is

ORDERED that the appellant's motion to consolidate this appeal with Docket No. 08-2336 is denied. It is further

ORDERED that the Secretary's motion is granted and this appeal is DISMISSED for lack of jurisdiction.

DATED: November 7, 2008 BY THE COURT:

/s/ John J. Farley, III
JOHN J. FARLEY, III
Judge

Copies to:

J. Myers Morton, Esq.
VA General Counsel (027)

jjw

APPENDIX M

VETERAN'S APPLICATION FOR COMPENSATION OR PENSION

[Fold-Out Exhibit, see next page]

SVS No Folder

FORM APPROVED OMB NO. 2900-0001

Veterans Administration

VETERAN'S APPLICATION FO :OMPENSATION OR PENSION

IMPORTANT: Read attached General and Specific instructions before completing this form. Type, print or write plainly.

DO NOT WRITE IN THIS SPACE VA DATE STAMP

1A. FIRST (Name) - MIDDLE (Name) - LAST (Name) OF VETERAN: ELMER A. HAWKINS

1B. TELEPHONE NO. (Incl. Area Code): 615-522-9369

2. MAILING ADDRESS OF VETERAN (Number and street or rural route, city or P.O., State and ZIP Code): [redacted] KNOXVILLE, TN. 37914

3A. VETERAN'S SOC. SECURITY NO.: [redacted] 0669

3B. SPOUSE'S SOC. SECURITY NO.: N/A

4. DATE OF BIRTH: [redacted] 1944

5. PLACE OF BIRTH: KNOXVILLE, TN.

6. SEX: MALE

7. RAILROAD RETIREMENT NO.: N/A

8. HAVE YOU EVER FILED A CLAIM FOR COMPENSATION FROM THE OFFICE OF WORKERS' COMPENSATION PROGRAMS? (Formerly the U.S. Bureau of Employees Compensation)
☐ YES ☒ NO

9A. VA FILE NUMBER: C- 55 [redacted] 0669

9B. HAVE YOU PREVIOUSLY FILED A CLAIM FOR ANY BENEFIT WITH THE VETERANS ADMINISTRATION?
☒ NONE
☐ HOSPITALIZATION OR MEDICAL CARE
☐ WAIVER OF NSLI PREMIUMS
☐ DISABILITY COMPENSATION OR PENSION
☐ VOCATIONAL REHABILITATION (Chapter 31)
☐ VETERANS EDUCATIONAL ASSISTANCE (Chapter 33 or 34)
☐ WAR ORPHANS OR DEPENDENTS EDUCATIONAL ASSIST. (Chap. 35)
☐ DENTAL OR OUTPATIENT TREATMENT
☐ OTHER (Specify)

9C. VA OFFICE HAVING YOUR RECORDS (If known): UNKNOWN.

SERVICE INFORMATION

NOTE: Enter complete information for each period of active duty including Reserve or National Guard Status. Attach Form DD 214 or other separation papers for all periods of active duty to expedite processing of your claim. If you do NOT have your DD 214 or other separation papers check (√) here ☐

10A. ENTERED ACTIVE SERVICE DATE	10A. ENTERED ACTIVE SERVICE PLACE	10B. SERVICE NO	10C. SEPARATED FROM ACTIVE SERVICE DATE	10C. SEPARATED FROM ACTIVE SERVICE PLACE	10D. GRADE, RATE, RATING, ORGANIZATION OR BRANCH OF SERVICE
1961	KNOXVILLE TENN.	DON'T REMEMBER	1964	FORT KNOX KY.	U.S. ARMY
1964	NASHVILLE TN.	0308951	1968	CALIF. GOT	U.S. NAVY

TENN. DEPARTMENT OF VETERANS AFFAIRS

10E. HAVE YOU EVER BEEN A PRISONER OF WAR? ☐ YES ☒ NO (If "Yes," complete Items 10F and 10G)

10F. NAME OF COUNTRY: N/A

10G. DATE(S) OF CONFINEMENT: N/A

11. IF YOU SERVED UNDER ANOTHER NAME, GIVE NAME AND PERIOD DURING WHICH YOU SERVED AND SERVICE NO.: N/A

12. IF RESERVIST OR NATIONAL GUARDSMAN, GIVE BRANCH OF SERVICE AND PERIOD OF ACTIVE OR INACTIVE TRAINING DUTY DURING WHICH DISABILITY OCCURRED: N/A

13A. IF YOU ARE NOW A MEMBER OF THE RESERVE FORCES OR NATIONAL GUARD GIVE THE BRANCH OF SERVICE: N/A

13B. RESERVE STATUS ☐ ACTIVE ☐ INACTIVE ☐ RESERVE OBLIGATION: N/A

13C. RESERVE OR NATIONAL GUARD UNIT ADDRESS: N/A

14A. ARE YOU NOW RECEIVING OR WILL YOU RECEIVE RETIREMENT OR RETAINER PAY FROM THE ARMED FORCES? N/A ☐ YES ☒ NO (If "Yes," complete Items 14B, 14C, and 14D)

14B. BRANCH OF SERVICE: N/A

14C. MONTHLY AMOUNT: $ N/A

14D. RETIRED STATUS ☐ PERMANENT ☐ TEMPORARY DISABILITY RETIRED LIST: N/A

15A. HAVE YOU EVER APPLIED FOR OR RECEIVED DISABILITY SEVERANCE PAY FROM THE ARMED FORCES? N/A ☐ YES ☒ NO (If "Yes," complete Item 15B)

15B. AMOUNT: $ N/A

16A. HAVE YOU RECEIVED LUMP SUM READJUSTMENT OR SEPARATION PAY FROM THE ARMED FORCES? N/A ☐ YES ☒ NO (If "Yes," complete Item 16B)

16B. AMOUNT: $ N/A

MARITAL AND DEPENDENCY INFORMATION

17A. MARITAL STATUS (Check one) ☐ MARRIED ☐ WIDOWED ☒ DIVORCED ☐ NEVER MARRIED (If you did not complete Items 17B through 21D)

17B. SPOUSE'S BIRTHDATE: N/A

17C. NUMBER OF TIMES YOU HAVE BEEN MARRIED: THREE

17D. NUMBER OF TIMES YOUR PRESENT SPOUSE HAS BEEN MARRIED: N/A

17E. IS YOUR SPOUSE ALSO A VETERAN? N/A ☐ YES ☐ NO (If "Yes," complete Item 17F)

17F. SPOUSE'S VA FILE NO.: C- N/A

18A. DO YOU LIVE TOGETHER? ☐ YES ☐ NO (If "No," complete Items 18B through 18D): N/A

18B. REASON FOR SEPARATION: N/A

18C. PRESENT ADDRESS OF SPOUSE: N/A

18D. AMOUNT YOU CONTRIBUTE TO YOUR SPOUSE'S SUPPORT MONTHLY: $ N/A

19. CHECK (X) WHETHER YOUR CURRENT MARRIAGE WAS PERFORMED BY ☐ CLERGYMAN OR AUTHORIZED PUBLIC OFFICIAL ☐ OTHER (Specify)

RECORD ON APPEAL

000001

BEST AVAILABLE COPY

NOTE: Furnish the following information about each of your marriages. A certified copy of the public or church record of your CURRENT marriage is required.

20A. DATE AND PLACE OF MARRIAGE	20B. TO WHOM MARRIED	20C. TERMINAT (Death, Divorce)	20D. DATE AND PLACE TERMINATED
I KNOW OF	NO LEGAL IMPEDIMENTS TO	MARRIAGES	

FURNISH THE FOLLOWING INFORMATION ABOUT EACH PREVIOUS MARRIAGE OF YOUR PRESENT SPOUSE

21A. DATE AND PLACE OF MARRIAGE	21B. TO WHOM MARRIED	21C. TERMINATED (Death, Divorce)	21D. DATE AND PLACE TERMINATED
	N/A		

IDENTIFICATION OF CHILDREN AND INFORMATION RELATIVE TO CUSTODY

NOTE: Furnish the following information for each of your unmarried children. A certified copy of the public or church record of birth or court record of adoption is required.

22A. NAME OF CHILD (First, middle initial, last)	22B. DATE OF BIRTH (Month, day, year)	22C. SOCIAL SECURITY NUMBER OF CHILD	22D. CHECK EACH APPLICABLE CATEGORY				
			MARRIED PREVIOUSLY	STEPCHILD OR ADOPTED	ILLEGITIMATE	OVER 18 ATTENDING SCHOOL	SERIOUSLY DISABLED

22E. NAME(S) OF ANY CHILD(REN) NOT IN YOUR CUSTODY	22F. NAME AND ADDRESS OF PERSON HAVING CUSTODY	22G. MONTHLY AMOUNT YOU CONTRIBUTE TO CHILD'S SUPPORT
		$

23A. IS YOUR FATHER DEPENDENT UPON YOU FOR SUPPORT?	23B. NAME AND ADDRESS OF DEPENDENT FATHER	23C. IS YOUR MOTHER DEPENDENT UPON YOU FOR SUPPORT?
☐ YES ☒ NO (If "Yes," complete 23D)	N/A	☐ YES ☒ NO (If "Yes," complete 23D)

23D. NAME AND ADDRESS OF DEPENDENT MOTHER	23E. NAME AND ADDRESS OF NEAREST RELATIVE	23F. RELATIONSHIP OF NEAREST RELATIVE
N/A		

NATURE AND HISTORY OF DISABILITIES

24. NATURE OF SICKNESS, DISEASE OR INJURIES FOR WHICH THIS CLAIM IS MADE AND DATE EACH BEGAN

EXPOSURE TO AGENT ORANGE, WOUNDS

25A. ARE YOU NOW OR HAVE YOU BEEN HOSPITALIZED OR FURNISHED DOMICILIARY CARE WITHIN THE PAST 3 MONTHS?	25B. DATES OF HOSPITALIZATION OR DOMICILIARY CARE	25C. NAME AND ADDRESS OF INSTITUTION
☐ YES ☒ NO (If "Yes," complete 25B and 25C)	N/A	N/A

NOTE: Items 26, 27, and 28 need NOT be completed unless you are now claiming compensation for a disability incurred in service.

IF YOU RECEIVED ANY TREATMENT WHILE IN SERVICE, COMPLETE THE FOLLOWING INFORMATION

26A. NATURE OF SICKNESS, DISEASE OR INJURY	26B. DATES OF TREATMENT	26C. NAME, NUMBER OR LOCATION OF HOSPITAL, FIRST-AID STATION, DRESSING STATION OR INFIRMARY	26D. ORGANIZATION AT TIME SICKNESS, DISEASE OR INJURY WAS INCURRED
WOUNDS	8-13-1964	VIETNAM	U.S. NAVY

LIST OVERSEAS PHYSICIANS AND HOSPITALS WHERE YOU WERE TREATED FOR ANY SICKNESS, INJURY OR DISEASE (SIC) ITEM 26A, BEFORE, DURING OR SINCE YOUR SERVICE, AND ANY MILITARY HOSPITALS SINCE YOUR DISCHARGE

27A. NAME	27B. PRESENT ADDRESS	27C. DISABILITY	27D. DATE
VA Hospital	Nashville, TN	Agent Orange	1983 1982 or

LIST PERSONS OTHER THAN PHYSICIANS WHO KNOW ANY FACTS ABOUT ANY SICKNESS, DISEASE OR INJURY ENTERED IN ITEM 26A, WHICH YOU HAD BEFORE, DURING OR SINCE YOUR SERVICE

28A. NAME	28B. PRESENT ADDRESS	28C. DISABILITY	28D. DATE
Dr Peggy B. McCallen	Ft Sanders Professional Bldg Knoxville, Tn.	Agent Orange Tumors	1986

IF YOU CLAIM TO BE TOTALLY DISABLED (Complete Items 29A through 32D)

29A. ARE YOU NOW EMPLOYED?	29B. IF YOU WERE SELF-EMPLOYED BEFORE BECOMING TOTALLY DISABLED, WHAT PART OF THE WORK DID YOU DO?
29C. DATE YOU LAST WORKED	29D. IF YOU ARE STILL SELF-EMPLOYED WHAT PART OF THE WORK DO YOU DO NOW?

30A. EDUCATION (Circle highest year completed)	30B. NATURE OF AND TIME SPENT IN OTHER EDUCATION AND TRAINING
1 2 3 4 5 6 7 8 (GRADE SCHOOL) 1 2 3 4 (HIGH SCHOOL) 1 2 3 4 (COLLEGE)	

LIST ALL YOUR EMPLOYMENT, INCLUDING SELF-EMPLOYMENT, FOR ONE YEAR BEFORE YOU BECAME TOTALLY DISABLED

31A. NAME AND ADDRESS OF EMPLOYER	31B. KIND OF WORK	31C. MONTHS WORKED	31D. TIME LOST FROM ILLNESS	31E. TOTAL EARNINGS

LIST ALL YOUR EMPLOYMENT, INCLUDING SELF-EMPLOYMENT, SINCE YOU BECAME TOTALLY DISABLED

32A. NAME AND ADDRESS OF EMPLOYER	32B. KIND OF WORK	32C. MONTHS WORKED	32D. TIME LOST FROM ILLNESS	32E. TOTAL EARNINGS

NET WORTH OF VETERANS AND DEPENDENTS (See attached instructions for Items 33A to 33E inclusive)

NOTE: Items 33A through 33E should be completed ONLY if you are applying for non-service-connected pension.

ITEM NO.	SOURCE	AMOUNTS				
		VETERAN	SPOUSE	NAME OF CHILDREN		
33A.	STOCKS, BONDS, BANK DEPOSITS	$	$	$	$	$
33B	REAL ESTATE (Do not include residence)					
33C.	OTHER PROPERTY					
33D.	TOTAL DEBTS					
33E.	NET WORTH	$	$	$	$	$

RECORD ON APPEAL

000003

"COME RECEIVED AND EXPECTED FROM ALL SOURC"

NOTE: Items 34A through 39B should be completed O... If you are applying for non-service-connected pension.

34A. HAVE YOU OR YOUR SPOUSE APPLIED FOR OR ARE YOU RECEIVING OR ENTITLED TO RECEIVE ANY BENEFITS FROM THE SOCIAL SECURITY ADMINISTRATION (OTHER THAN SSI) OR RAILROAD RETIREMENT BOARD? ☐ YES ☐ NO (If "Yes," complete Items 34B through 34F as applicable)	34B. MONTHLY AMOUNT (Include Medicare Deductions)	34C. BEGINNING DATE	34D. DATE YOU EXPECT BENEFITS TO BEGIN
	VETERAN $		
	SPOUSE $		
34E. WILL YOU OR YOUR SPOUSE APPLY FOR EITHER BENEFIT DURING THE NEXT 12 MONTHS? ☐ YES ☐ NO	34F. DATE OF INTENTION TO APPLY		
	VETERAN	SPOUSE	

35A. HAVE YOU OR YOUR SPOUSE APPLIED FOR OR ARE YOU RECEIVING OR ENTITLED TO RECEIVE ANNUITY OR RETIREMENT BENEFITS OR ENDOWMENT INSURANCE FROM ANY OTHER SOURCE? ☐ YES ☐ NO (If "Yes," complete Items 35B through 35E, as applicable)

35B. MONTHLY AMOUNT	35C. BEGINNING DATE	35D. DATE OF INTENTION TO APPLY	35E. SOURCE OF BENEFIT
VETERAN $			
SPOUSE $			

SOURCE OF VETERAN AND DEPENDENTS INCOME (Specify source for Items 36F, 37F and 38F "ALL OTHER INCOME" in Item 40, "REMARKS")		AMOUNT OF INCOME				
		VETERAN	SPOUSE	NAME OF CHILD/REN		
36. AMOUNT RECEIVED FROM JAN 1 TO THE DATE YOU SIGN THIS STATEMENT	A. EARNINGS	$	$	$	$	$
	B. SOCIAL SECURITY (GREEN CHECK)					
	C. OTHER ANNUITIES AND RETIREMENTS					
	D. DIVIDENDS AND INTEREST, ETC.					
	E. SUPPLEMENTAL SECURITY INCOME (GOLD CHECK)					
	F. ALL OTHER INCOME					
37. AMOUNT EXPECTED FROM DATE YOU SIGN THIS STATEMENT TO END OF THIS CALENDAR YEAR	A. EARNINGS					
	B. SOCIAL SECURITY (GREEN CHECK)					
	C. OTHER ANNUITIES AND RETIREMENTS					
	D. DIVIDENDS AND INTEREST, ETC.					
	E. SUPPLEMENTAL SECURITY INCOME (GOLD CHECK)					
	F. ALL OTHER INCOME					
38. AMOUNT EXPECTED FOR THE NEXT CALENDAR YEAR	A. EARNINGS					
	B. SOCIAL SECURITY (GREEN CHECK)					
	C. OTHER ANNUITIES AND RETIREMENTS					
	D. DIVIDENDS AND INTEREST, ETC.					
	E. SUPPLEMENTAL SECURITY INCOME (GOLD CHECK)					
	F. ALL OTHER INCOME					

39A. GROSS AMOUNT OF FINAL PAY RECEIVED	39B. DATE FINAL PAY WAS RECEIVED
$	

40. REMARKS (Identify your statements by their applicable item number. If additional space is required, attach separate sheet and identify your statement by their item numbers)

NOTE: Filing of this application constitutes a waiver of military retired pay in the amount of any VA compensation to which you may be entitled. See instructions for Items 34A and 36 D inclusive, Retired Pay.

CERTIFICATION AND AUTHORIZATION FOR RELEASE OF INFORMATION - I certify that the foregoing statements are true and complete to the best of my knowledge and belief. I CONSENT that any physician, surgeon, dentist or hospital that has treated or examined me for any purpose, or that I have consulted professionally, may furnish to the VETERANS ADMINISTRATION any information about myself, and I waive any privilege which renders such information confidential.

41. DATE SIGNED	42. SIGNATURE OF CLAIMANT
10-22-1990	SIGN HERE Edmund A. Hawkins

WITNESSES TO SIGNATURES OF CLAIMANT IF MADE BY "X" MARK

NOTE: Signature made by mark must be witnessed by two persons to whom the person making the statement is personally known, and the signatures and addresses of such witnesses must be shown.

43A. SIGNATURE OF WITNESS	44A. SIGNATURE OF WITNESS
43B. ADDRESS OF WITNESS	44B. ADDRESS OF WITNESS

PENALTY - The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any document or evidence of a material fact, knowing it to be false or for the fraudulent acceptance of any payment to which you are not entitled.

RECORD ON APPEAL

000004

APPENDIX N

Carlos L. Velado, M.D.
Suite 2
Blount Professional Building
Knoxville, Tennessee 37920
Telephone 525-3782

January 13, 1992

To Whom It May Concern:

Re: Mr. Elmer A. Hawkins SS #[Redacted]
4305 San Juan Drive
Knoxville, Tennessee 37924

This forty-four year old male was initially seen by me on August 29, 1991. He had a cervical lymphnode of the lower chin and six soft tissue tumors, right upper arm, anterior forearm, right, right posterior forearm, right elbow, left upper arm and left anterior buttock. He also had a piece of metal in the forehead. All of the soft tissues tumors, the piece of metal and the cervical lymphnode was excised on November 15, 1991 at the East Tennessee Baptist Hospital. Please note pathological diagnosis on the cervical lymphnode no definite diagnosis has been made.

The patient gives a history of having been exposed to Agent Orange during the Vietnam Conflict in 1964 and 1965. I have reviewed the literature supplied me on the side effects of Agent Orange and this seems to be

a typical case of soft tissue tumors which include lipomat and sarcomas.

I have reviewed his medical history dating back since his discharge and prior to coming to this office he had had multiple soft tissue tumors excised by other surgeons.

He was followed closely through the office and presented with a deep cervical lymphnode which was excised at the Surgery Center on January 3, 1992. He also had a soft tissue tumor excised from the right arm, left arm and middle right finger on that date.

He presents today, January 13, 1992. He has another soft tissue tumor of the right knee, right arm and one on the genital.

He works presently as an engineer for the railroad. He sits directly behind the engine and breaths diesel smoke all day. I do not feel that due to the surgery that he has had on the neck that he should work in this environment and have advised him of this. I do feel that this is an irritating factor to the throat and he will continue to have sympto as long as he breathes the smoke. He also has had several soft tissue tumors removed from both arms, and each time surgery is performed ther is a degree of weakness of this area, therefore, I would not feel that he should he allowed to climb off and on moving objects such as trains etc.

Due to the history that this patient presents with and the nature in which these tumors have appeared since seeing me I would feel that thi is a situation that will worsen instead of go in remission. I base thi on the fact

that the situation has been present since his discharge from the military.

CLV/j nance

/s/Carlos L. Velado, M.D.
Carlos L. Velado, M.D.

9. MENTAL / NERVOUS IMPAIRMENT
(if applicable)

(a) What is impact of stress on patient's daily activities?

Presently works as an engineer and this is a stressful occupation.

(b) What stress and problems in interpersonal relations has patient experienced?

/_/ Class 1 - Patient is able to function under stress and engage in interpersonal relations (no limitation).

/_/ Class 2 - Patient is able to function in most stress situations and engage in most interpersonal relations (slight limitations).

/x/ Class 3 - Patient is able to engage in only limited stress situations and engage in only limited interpersonal relations (moderate limitations).

/_/ Class 4 - Patient is unable to engage in stress situations or engage in interpersonal relations (marked limitations).

/_/ Class 5 - Patient has significant loss of psychological, physiological, personal and social adjustment (severe limitations).

/_/ Remarks:

Patient has a definite pattern of soft tissue tumors, lipomata, sarcoma and lymphnodes which have recurred since 1973. It seems that they are recurring to a much faster degree due to the recurrence in November, December 1991 and January 1992. Therefore, he has been advised not to return to work in an environment where he breathes diesel smoke all

day. Last cervical node removed in 1992 and was deep into the left side of neck. Node removed on November 15, 1991–Comment from pathologist: Lymphnode Chin: There is a histologic pattern of atypical hyperplasia and this change may be reactive in nature and possibly associated with a viral infection such as infectious mononucleosis or the diagnosis of lymphoma cannot be made histologically on the basis of findings in the node, lymphoma cannot be entirely excluded as a possibility.

10. PROGNOSIS

(a) What is the patient's prognosis? Specify a prognosis for each of the various diagnoses listed. Use a separate sheet if necessary.

The patient has a history of soft tissue tumors, lipomata, sarcoma, etc. dating back to 1973. He had six tumors, cervical lymphnode and piece of metal in forehead removed in November 1991. He had soft tissue tumor of the right forearm, left arm and middle finger removed January 3, 1992 along with deep cervical node.

(b) How long from now do you feel patient's maximum medical improvement will be reached?

/_/ 3 months /_/ 6 months /_/ 1 year /_/ longer
/x/ no improvement expected

Since This has been present for a long period of time and the patient since January 3, 1992 has developed three more soft tissue tumors I feel that it is a definite

pattern of recurrence of soft tissue tumors and they will continue to recur.

11. SIGNATURE
(Print)

/s/Carlos L. Velado, M.D. Carlos L. Velado, M.D.
Name of Attending Physician Degree Specialty

615 525 3782
Telephone

Suite 2, Blount Professional Building,
Street Address

Knoxville, Tn. 37920
City or Town State or Province Zip Code

January 13, 1992
Signature Date

APPENDIX O

Carlos L. Velado, M.D.
Suite 2
Blount Professional Building
Knoxville, Tennessee 37920
Telephone 525-3782

February 15, 1993

TO WHO IT MAY CONCERN:

Re: Elmer A. Hawkins
4305 San Juan Drive
Knoxville, TN. 37914

The above noted patient initially presented to my office on August 29, 1991. He had multiple fatty tumors and a lymphnode. He was taken to surgery on November 15, 1991 and the tumors removed, the lymphnode removed and a piece of metal removed from the forehead. I am listing a copy of the diagnosis from this surgery as taken from Dorland's 25th Edition Medical Dictionary.

While Mr. Hawkins was being followed he developed several other fatty tumors and these were removed on January 3, 1992. He has been followed intermittently through the office had had several more fatty tumors and lymphnodes, removed on April 2, 1992. Copies of the diagnosis as taken from Dorland's 25th Edition Medical Dictionary attached.

His last surgery was on November 12, 1992 and at this time he had six fatty tumors removed.

I have been supplied with and read all the material relating to Agent Orange. Mr. Hawkins gives a history of having been exposed to. Agent Orange during the Vietnam conflict. I have practiced medicine for twenty years and seen many tumors and lynphnodes, however, I have not seen them progress as this patients has. He also was diagnosed as having post traumatic syndrome after his duties in the Vietnam, however, this had been well under control. He was advised that he should retire from his job as an engineer with the Norfolk-Southern Railroad due to his may disabilities. He has retired and I feel that this is a direct result of his multiple surgeries and his contact with Agent Orange. He had had tumors removed over the years prior to seeing me, however, there would be more of an interval.

He is being seen at this time and has two lymphnodes in the right throat, one fatty tumor left jaw, two fatty tumors right breast, one fatty tumor left elbow and one fatty tumor in the left knee and one in the right knee. These will be removed shortly.

I feel that he is 100% disabled to work and I attribute this from history and treatment referring back to the literature on Agent Orange to this Chemical exposure.

/s/Carlos L. Velado, M.D.
Carlos L. Velado, M.D.

CLV/jwn
IF YOU WISH MY RECORDS PLEASE CONTACT THE OFFICE.

Page # 2

Elmer A. Hawkins

January 2, 1992

The Surgery Center

1 – Mass right arm:	Lipome–Fatty tumor, separation of cells.
2 – Mass left arm:	Lipome–Fatty tumor, separation of cells.
3 – Lesion middle finger, rt. hand:	Hyperkeratosis of middle finger, right hand Hypertrophy of the layer of skin also called acanthokeradoma, tumor made of squamous cells-pre-malignant.
4 – Cervical node:	Degeneration of tissue and cells.

April 2, 1992

The surgery Center

Mass right neck:	Sialothiasis of salivary gland. (Calculi-cyst, hardened)
Mass right jaw:	Lipoma–Fatty tumor –separation of cells.

Mass abdomen:	Lipoma–Fatty tumor –separation of cells.
Mass abdomen:	Lipoma–Fatty tumor –separation of cells.
Mass abdomen:	Lipoma–Fatty tumor –separation of cells.
Mass right knee:	Lipoma–Fatty tumor –separation of cells.
Mass right knee:	Lipoma–Fatty tumor –Separation of cells.
Mass left knee:	Lipoma–Fatty tumor –Separation of cells.
Mass left knee:	Lipoma–Fatty tumor –Separation

NOTE: There were three masses of the abdomen and two of right knee two of left knee, this is not a duplication

Carlos L. Velado, M.D.
MD007566

Prepared by

Joyce W. Nance
Assistant

APPENDIX P

Carlos L. Velado, M.D.
Suite 2
Blount Professional Building
Knoxville, Tennessee 37920
Telephone 525-3782

April 13, 1992

TO Whom It May Concern:

Re: Elmer A. Hawkins
SS #[Redacted]

This is to confirm that Mr. Elmer A. Hawkins has had surgery performed by me on three occasions, November 15, 1991, January 2, 1992 and April 2, 1992. I am attaching a list of the tumors and lymphnodes removed along with an explanation from Dorland's Illustrated Medical Dictionary Twenty-Fifth Edition.

I have reviewed the information on the exposure to Agent Orange, and I do feel, in my professional and medical opinion, that the occurance and recurrance of these tumors and lymphnodes are a result of this patient's exposure to Agent Orange during his stay in Vietnam.

I have advised him that due to the three surgeries on his neck and his continued breathing of diesel smoke that he should not return to work in this environment. This would irritate his situation. Also due to the rapid

recurrance and the surgery on the arms and legs he should not do the type work that he is now doing.

If you desire addional information please contact this office, I feel that this patient has had a rapid recurrance of the tumors, as the ones removed on January 2, 1992 were not present in November and the ones removed in April did not occur until February and March 1992. He has been watched closely and will be in the future.

He is 100% disabled to perform the work that he is now doing.

/s/Carlos L. Velado, M.D.
Carlos L. Velado, M.D.

CLV/jwn
Enclosure: Copy of pathology reports 11/15/91; 1/2/91 and 4/2/92 with explanation of diagnosis.

Pathology Reports are definitions taken from Dorland's Medical Dictionary 25th Edition:

Elmer A. Hawkins
Prepared 4/10/92

Surgery performed East Tennessee Baptist Hospital November 11, 1991.

Pathology report with definition:

Specimen Removed:

1–Mass right arm:	Collangenized connective tissues, an albumoid–main supportive protein of tendon and connective tissues.
2–Anterior right forearm:	Degeneration of tissue.
3–Right posterior forearm:	Lipoma–Fatty tumor–Separation of cells.
4–Right posterior forearm:	Lipoma–Fatty tumor–Separation of cells.
5–Right Elbow:	Lipoma–Fatty tumor–Separation of cells.
6–Left upper arm:	Lipoma–Fatty tumor–Separation of cells.

7–Left anterior buttock:	Dermatofibroma, a large sized growth also called dermatosarcoma.
8–Forehead:	Piece of Metal (Foreign Body)
9–Cervical lymph–node:	See comments: There is a histologic patter of atypical hyperplasia. A diagnosis of lymphoma cannot be entirely excluded as a possibility. If the patient has other lymphadenopathy or enlarged nodes should be watched closed and removed for further studies.

Page # 2

Elmer A. Hawkins

January 2, 1992

The Surgery Center

1 – Mass right arm:	Lipoma–Fatty tumor, separation of cells.
2 – Mass left arm:	Lipoma–Fatty tumor, separation of cells.

3 – Lesion middle finger, rt. Hand:	Hyperkeratosis of middle finger, right hand Hypertrophy of the layer of skin also called acanthokeradoma, tumor made of squamous cells-pre-malignant.
4 – Cervical node:	Degeneration of tissue and cells.

April 2, 1992

The Surgery Center

Mass right neck:	Sialothiasis of salivary gland. (Calculi-cyst, hardened)
Mass right jaw:	Lipoma Fatty tumor –separation of cells.
Mass abdomen:	Lipoma–Fatty tumor –separation of cells.
Mass abdomen:	Lipoma–Fatty tumor –separation of cells.
Mass abdomen:	Lipoma–Fatty tumor –separation of cells.
Mass right knee:	Lipoma–Fatty tumor –separation of cells.

Mass right knee:	Lipoma–Fatty tumor –Separation of cells.
Mass left knee:	Lipoma–Fatty tumor –Separation of cells.
Mass left knee:	Lipoma–Fatty tumor –Separation

NOTE: There were three masses of the abdomen and two of right knee two of left knee, this is not a duplication

/s/Carlos L. Velado, M.D.
Carlos L. Velado, M.D.
MD007566

Prepared by

/s/Joyce W. Nance
Joyce W. Nance
Assistant

APPENDIX Q

Carlos L. Velado, M.D.
Suite 2
Blount Professional Building
Knoxville, Tennessee 37920
Telephone 525-3782

August 31, 1993

To Whom It May Concern:

Re: Elmer A. Hawkins

This is to confirm that the above noted patient was initially seen by me on August 29, 1991.At that time he had a cervical lymphnode, six fatty tumors and a foreign body of the forehead,

He was taken to surgery on November 15, 1991 and the lesions removed. He has been furnished a copy of the pathology report, and if you will note the comment read by Dr. Lynn Blake, pathology, lymphoma could not be ruled out.

He continued to have trouble and on January 3, 1992 he had two fatty tumors removed from the left and right arm and a left cervical lymphnode removed. He also had a tumor of the middle finger right hand removed.

He was followed through the office and on April 10, 1993 he had nine fatty tumors removed. He had a

lesion removed from the chest wall, a lesion from the left mandible, lymphnode left neck, lesion abdominal wall and lesion of the left knee. He also had a node removed from the salivary gland.

Mr. Hawkins has eight fatty tumors that will be removed when he has time to have the surgery in the fall.

He was advised to retire from his work at the Southern Railroad where he was an engineer and made a lucritive salary. He was sent to Dr. Misra, the doctor for the railroad and this was confirmed.

I have been a general surgeon for twenty-one years, and I have never seen fatty tumors grow this fast. I would, therefore, feel that it was his exposure to the Agent Orange during the Vietnam Conflict.

PLEASE REVIEW THE PATHOLOGY REPORTS THAT MR. HAWKINS HAS IN HIS POSSESSION, AND I BELIEVE YOU WILL FIND THAT LYMPHOMA HAS NOT BEEN EXCLUDED AND HE ALSO HAD A DERMATOFIBROMA WHICH IS DESCRIBED IN THE MEDICAL DICTIONARY AS A TYPE OF SARCOMA.

/s/Carlos L. Velado, M.D.
Carlos L. Velado, M.D.

CLV/n

/s/ AMER. LEGION
APPEALS REP/BVA
CERTIFIED TRUE COPY
090993

APPENDIX R

DEPARTMENT OF DEFENSE
ARMED FORCES INSTITUTE
OF PATHOLOGY
WASHINGTON, DC 20306-6000

Department of Environmental
& Toxicologic Pathology
6825 16th Street, N.W., Bldg. 54, Room M-093,
Washington, DC 20306-6000
Telephone (202) 782-2830 Fax (202) 782-9215

[seal] **REPLY TO ATTENTION OF**

PATENT IDENTIFICATION

AFIP ACCESSION NO.	SEQUENCE NO.
2505074-1	01
HAWKINS, ELMER A.	SSN: [Redacted]
CY-98-2131 S	MRL/ccl
November 15, 1999	

Chairman,
Department of Veterans Affairs (Central Office)
Board of Veterans Appeals
Washington, DC 20420

Subject: Elmer A. Hawkins, VA Claim # [Redacted]

In the memorandum to the VHA Office of Patient Care Services (11), signed by Jack W. Blasingame, dated September 29, 1999, there was a request that the AFIP

review this case for a second time, and to consider 3 issues.

1. Review CY-98-2131, an additional specimen from this veteran.
2. Express an opinion as to "whether the veteran's soft-tissue growths are related to soft-tissue sarcoma".
3. Express an opinion as to whether the patient's soft tissue growths were "caused by the veteran's exposure to chemical dioxins".

1. AFIP REPORT CY-98-2131, Fine needle aspirate, left knee, (Cytology): Mature appearing adipose tissue. Clinical correlation is advised, (see comment).

The specimen received consists of a small amount of mature appearing adipose tissue. We are unable to make a more definitive diagnosis based on the examined material. Correlation with clinical features is advised.

Three pap stained slides were received, labeled "CY-98-2131, Cytopath, DVAMC Nashville, FNA. Hawkins, Elmer [Redacted]", along with an accompanying accession form for CY98-2131. No pathology report from the originating institute was received. The case was reviewed in collaboration with the Department of Soft Tissue Pathology and the Division of Cytopathology.

2. We note that in the previous review of pathologic material from this Veteran that the patient has prior diagnoses of benign soft tissue tumors including three lipomas, three angiolipomas and five dermatofibromas. Material was not provided

for re-review of these previous specimens. Lipoma, angiolipoma and dermatofibroma are benign neoplasms of adipose tissue and the dermis of the skin respectively. Soft-tissue sarcoma is "a general term for a malignant tumor derived from extraskeletal connective tissue" (see reference 1). Using this definition lipoma, angiolipoma and dermatofibromas would not be classified as soft-tissue sarcomas.

3. In the previous review of this Veteran's pathology specimens in 1995, it was indicated that "in a reported series of more than one-thousand cases of Vietnam veterans the incidence of lipomas was 5.98%, and there was an incidence of 5.5% of lipomas in a control group of non-Vietnam veterans" (see reference 2). Although in the same study dermatofibromas occurred with greater frequency in the Vietnam group, it was indicated that they "are common and benign and do not have prognostic importance." (see reference 2). The relatively high frequency in which multiple angiolipomas and dermatofibromas occur was also indicated in the previous review, (see reference 3).

The VA Claims File and three glass slides are returned to you along with this report.

/s/Michael R. Lewin-Smith, M.D.
Michael R. Lewin-Smith, M.D.
Staff Pathologist
Department of Environmental &
Toxicologic Pathology

/s/Florabel G. Mullick, M.D.
Florabel G. Mullick, M.D.
Acting Chair
Department of Environmental &
Toxicologic Pathology

References:

1. Dorland's Illustrated Medical Dictionary, 28th Edition, W.B. Saunders Company Piladelphia, 1994.

2. Irey NS, Mullick FG, Foster WD. A morphologic study of Vietnam Veterans. Modem Pathology Vol 2, No. 4, pages 360-364, 1989.

3. Soft Tissue Pathology, Enzinger FM, Weiss SW, Third Edition, Mosby–Year Book Inc. St. Louis, 1995.

Dr. Velado, a trained VA doctor, treated the veteran.

(i) First Opinion (1/92)

"...The patient gives a history of having been exposed to Agent Orange during the Vietnam Conflict in 1964 and 1965. I have reviewed the literature supplied me on the side effects of Agent Orange and this seems to be a typical case of soft tissue tumors which include lipomat and sarcomas." "I have reviewed his medical history dating back since his discharge and prior to coming to this office he had had multiple soft tissue tumors excised by other surgeons..."
"...Due to the history that this patient presents with and the nature in which these tumors have appeared since seeing me I would feel that this is a situation that will worsen instead of go in remission. I base this on the fact that the situation has been present since his discharge from the military ..." (emphasis supplied)

(ii) Second Opinion (1/92)

"Patient has a definite pattern of soft tissue tumors, lipomata, sarcoma and lymphnodes which have recurred since 1973. It seems that they are recurring to a much faster degree due to the recurrence in November, December 1991 and January 1992 ... Node removed on November 15, 1991–Comment from pathologist: Lymphnode Chin: There is a histologic pattern of atypical hyperplasia and this change may be reactive in nature and possibly associated with a viral infection such as infectious mononucleosis or the diagnosis of lymphoma cannot be made histologically on the basis of findings in the node, lymphoma cannot be entirely excluded as a possibility. The patient has a history of soft tissue tumors, lipomata, sarcoma, etc.

dating back to 1973. He had six tumors, cervical lymphnode and piece of metal in forehead removed in November 1991. He had soft tissue tumor of the right forearm, left arm and middle finger removed January 3, 1992 along with deep cervical node. Since this has been present for a long period of time and the patient since January 3, 1992 has developed three more soft tissue tumors. **I feel that it is a definite pattern of recurrence of soft tissue tumors and they will continue to recur.**" (emphasis supplied)

(iii) Third Opinion (4/92)

"This is to confirm that Mr. Elmer A. Hawkins has had surgery performed by me on three occasions, November 15, 1991, January 2, 1992 and April 2, 1992. I am attaching a list of the tumors and lymphnodes removed along with an explanation from Dorland's Illustrated Medical Dictionary Twenty-Fifth Edition. I have reviewed the information on the exposure to Agent Orange, and I do feel, in my professional and medical opinion, that the **occurrence and recurrence of these tumors and lymphnodes are a result of this patient's exposure to Agent Orange during his stay in Vietnam**...

...If you desire additional information please contact this office. I feel that this patient has had a rapid recurrence of the tumors,..."

Dr. Velado also enclosed with this opinion pathology reports indicating, among other things: "lipoma", "dermatosarcoma" and "lymphoma cannot be entirely excluded as a possibility...

Dr. Velado referenced and enclosed a page from a medical treatise Dorland's Illustrated Medical Dictionary Twenty-Fifth Edition's defining dermatofibroma, "...called also *dermatofibrosarcoma protuberans...*" Dr. Velado was specifically stating he had found the veteran had dermatofibrosarcoma protuberans.

(iv) Fourth Opinion (2/15/93)

"... I have been supplied with and read all the material relating to Agent Orange. Mr. Hawkins gives a history of having been exposed to Agent Orange during the Vietnam conflict. **I have practiced medicine for twenty years and seen many more tumors and lymphnode, however, I have not seen them progress as this patients has. ...He has retired and I feel that this is a direct result of his multiple surgeries and his contact with Agent Orange. *He had had tumors removed over the years prior to seeing me, however, there would be more of an interval...***

...I feel that he is 100% disabled to work and ***I attribute this from history and treatment referring back to the literature on Agent Orange to this chemical exposure...***"

...IF YOU WISH MY RECORDS PLEASE CONTACT THE OFFICE..." (emphasis supplied)

(v) Fifth Opinion (8/93)

"This is to confirm that the above noted patient was initially seen by me on August 29, 1991. At

that time he had a cervical lymphnode, six fatty tumors and a foreign body of the forehead."

"He was taken to surgery on November 15, 1991 and the lesions removed. He has been furnished a copy of the pathology report, and if you will note the comment read by Dr. Lynn Blake, pathology, lymphoma could not be ruled out..."

"...I have been a general surgeon for twenty-one years, and I have never seen fatty tumors grow this fast. I would, therefore, feel that it was his exposure to the Agent Orange during the Vietnam Conflict.

PLEASE REVIEW THE PATHOLOGY REPORTS THAT MR. HAWKINS HAS IN HIS POSSESSION, AND I BELIEVE YOU WILL FIND THAT LYMPHOMA HAS NOT BE EXCLUDED AND HE ALSO HAD A DERMATOFIBROMA WHICH IS DESCRIBED IN THE MEDICAL DICTIONARY AS A TYPE OF SARCOMA..." (emphasis supplied)

APPENDIX S

Craig N. Bash M.D., Neuro-Radiology
7831 Woodmont Avenue, Bethesda, MD 20814
Phone: (301) 767-9525 Fax: (301) 365-2589
E-mail DrBash@Doctor.com (Universal Provider Identification Number [UPIN] = 1225123318)

INDEPENDENT MEDICAL EVALUATION
1 March 2007

To: VA

Re: HAWKINS, ELMER A
C# [redacted]
DOB:

I have reviewed this patient's medical records for the purpose of making a medical opinion concerning his skin lesions as they may relate to his service time. In order to make my evaluation, I have carefully reviewed the following information:

Claims folder, which I reviewed at the BVA on 27 Feb 2007;
Service Medical Records;
Post service Medical records;
Imaging reports;
Patients lay statements;
Other medical opinions;
Medical literature review

OPINIONS:

See Below.

Expertise-Special Knowledge:

I have special knowledge in the area of pathologic skin diseases as I am double board certified sub specialist, am a Senior Member of the American Society of Neuro-Radiology (ASNR), and am an attending level school of medicine associate professor. I have completed a three fellowship in neuroradiology (2 years of which were at the NIH). I have performed and/or interpreted plain x-rays, CT scans, nuclear medicine scans, and MRI (basic and research/experimental) scans on hundreds of patients with primary and metastatic skin lesions/disorders and I have correlated my findings with the clinical record/physical exam. (Please see my attached C.V.)

Competency:

I am highly competent to make the medical opinion/s herewith because I am a licensed physician with extensive specialized training and experience in the areas of interest: (as described above), I have performed several hundred VA IMEs and I am familiar with the VA rating schedule as published in the CFRs/U.S. Codes, I have reviewed the medical record and the patient's lay statements, I have referenced current applicable publications (explained how they apply to this patient's medical dam set), I have examined the patient by way of reviewing his pivotal imaging study reports, I have reviewed pertinent positive and negative medical data, and I have

reviewed/reference other physicians professional medical opinions[1]

Facts:

Patient entered service fit for duty.

Patient was exposed to Agent Orange in Viet Nam.

Patient now has neoplasm of his skin in the form of lipomas, angiolipomas and dermatofibromas as per path reports.

Discussion:

Several physicians and the AFIP have reviewed this case twice. Medical opinions appear on both sides of the causation issue concerning the relationship between the induction of neoplasms secondary to Agent Orange exposure. The medical literature, as reviewed by the Institute of Medicine(IOM), states that Agent Orange is capable and does induce neoplasms. The IOM specifically associates sarcomas with Agent Orange exposure.

The question concerning this patient's case involves the induction of the following neoplasms: lipomas, angiolipomas and dermatofibromas. These types of neoplasm have not been specifically addressed by the IOM.

The AFIP noted that according to Irey in 1989 the rate of occurrence of lipomas was .48% higher in the exposed group as compared to the unexposed (agent Orange) group.

The 2004 IOM reports shows that there is a very good biological plausible pathway which shows that TCDD promotes carcinogenesis, repress the expression of several tumor suppression genes and immortalizes human keratinocytes. (page 260).

It is important to note that Drs. Mullick and Smith, even on second request, did not say that there was no or that there was a negative association between this patients tumors and agent Orange but rather they simple repeated the literature which shows a higher incidence although not prognostic.

The questions here does not deal with prognosis it deals with etiology and it is my opinion that the most likely etiology for this patient's diffuse and varied skin tumors is his exposure to agent orange for the following reasons:

1. He was exposed to Agent Orange.
2. His family history is negative for multiple skin tumors.
3. Agent Orange is know to promote carcinogenesis, repress the expression of several tumor suppression genes and immortalizes human keratinocytes.
4. This patient's record did not contain a more likely etiology.
5. The Irey and IOM literature studies support an association.
6. No literature source shows a negative association or a protective association between Agent Orange and tumor induction.
7. This patient has tumors albeit benign forms he still has abnormal masses within his skin.

8. The relative frequency of these tumors in the population at large does not negate the fact that this patient's tumor are likely due to his agent orange exposure because the population at large does not have the same family history nor did they likely have the same exposure history, therefore interpolation from the population frequency to this patient's clinical situation is not a fair analysis.
9. This opinion is consistent with the opinions of Dr. Velado.
10. This opinion is consistent with the data presented in the AFIP opinion.
11. The AFIP opinion did not rule out an association they just repeated that the data was not prognostic. (Please note that no reference or opinion concerning etiology/nexus/linkage was provided.)

Respectfully submitted,

/s/Craig N. Bash M.D.
ELECTRONICALLY SIGNED

Craig N. Bash M.D., M.B.A.
Board Certified-Associate Professor of Radiology and Nuclear Medicine
Uniformed Services School of Medicine
References:

Irey et al. A morphologic study of Vietnam Veterans. Modern Pathology Vol 2, No. 4, pages 360-365, 1989.

Orthopaedics, Principles and Their Applications, 4th Ed., Vol. 2 Turek, (1984)

1. Please note that this opinion is academic in nature and as such is not meant to reflect negatively on any other professional who might hold nn alternative professional opinion.
2. Competency: I am highly competent to make the above comprehensive opinion/s because I am n licensed physician with extensive specialized training and experience in the areas of interest (see attached C.V.), I have reviewed the medical record, reviewed the patients lay statements, spoken to the patient on the phone, referenced current applicable publications (and explained how they apply to this patient's medical data set), examined the patient by way of reviewing his imaging study reports, reviewed pertinent positive and negative medical data and reviewed/reference other physician's professional medical opinions[1].
3. Please note that some of the medical opinions contained in this patient's record may not be "comprehensive" because they not contain all of the elements that are considered important for competency (see competency section above).

APPENDIX T

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Docket No. CCS [Redacted]

[Dated July 17, 2001]

ELMER A. HAWKINS,	)
	)
Petitioner,	)
	)
v.	)
	)
ANTHONY J. PRINCIPI	)
Secretary of Veterans Affairs,	)
	)
Respondent.	)
	)

PETITION FOR EXTRAORDINARY RELIEF

Comes petitioner, Elmer A. Hawkins, through counsel, and pursuant to 28 U.S.C. § 1651 and U.S. Vet. App. R. 21, petitions this Court to compel action of the respondent Secretary to grant petitioner extraordinary relief and shows as follows:

(1) Precise relief sought:

a. Sanction respondent for misrepresentation to this court.

b. Alternatively, order respondent to make a ruling on petitioner's claim within a definite and reasonable period of time and retain jurisdiction of this case until such time.

(2) Statement of facts

Petitioner is a combat injured Vietnam veteran, who was decorated with the purple heart, among other medals, and was exposed repeatedly to Agent Orange. Since his return from Vietnam, petitioner's condition has been and continues to be terribly disabling. He has tumors that quickly grow all over and in his body from, among other places, between knee, hip, jaw, elbow, finger and wrist joints, on glands through his body, on his penis, under his skin, on his abdomen, neck, chin, forehead, jaw, chest, neck, buttock and arms to on his larynx. The tumors are painful and disabling. The tumors impede his ability to walk, talk, sleep, stand, sit, eat, breath, urinate and make him impotent. Once too painful, the tumors are required to be removed surgically.

These tumors have been appearing since 1972, and continue to this very day.

Since 1992, petitioner's treating physician, Dr. Carlos Velado, has specifically, repeatedly, undoubtedly ("100%") and unequivocally opined that petitioner's tumors are caused by exposure to agent orange in Vietnam. His opinions are attached as exhibits 1, 2, 3, 4 and 5.

Additionally in 1992, petitioner's treating physician and other medical personnel have specifically found petitioner to have "dennatofibroma", "soft tissue tumors which include lipomat and sarcomas" and "soft tissue sarcoma" which, pursuant to 38 C.F.R. § 3.309, petitioner has alleged are presumed to be caused by exposure to agent orange. See exhibits 4 and 6.

a. Administrative proceedings

Petitioner filed his claim for service connection for his maladies caused by agent orange on October 22, 1990. This claim has been pending for almost 11 years ago. See exhibit 7. (There is a previous claim filed by petitioner that respondent "lost" after petitioner reported his copy of the previous claim had been destroyed in a fire. That previously filed claim is not the subject of this petition.)

Since then, there have been many regional office decisions, all of which have denied the claim of service connection, five (5) BVA decisions, four (4) of which were BVA remands to the regional office. See exhibits 8, 9, 10, 11 and 12.

The first BVA decision in April, 1994, remanded the claim for readjudication and to obtain "additional clarifying medical evidence". Bettina S. Callaway and Jack W. Blasingame were two of the decision makers. See exhibit 8.

The second BVA decision in February, 1996, decided the claim was not well grounded. Jack W. Blasingame was the decision maker. See exhibit 9.

Petitioner appealed that decision to this court on March 5, 1996. See exhibit 13. This court's docket number for that appeal was 96-192. The case was remanded by this court's order dated October 1, 1996. See exhibit 14.

The third BVA decision in February, 1997, remanded the case to obtain medical records from Dr. Velado and to provide a special dermatological examination. The decision maker was Jack W. Blasingame. See exhibit 10.

Appellee has been told there was a February 19, 1998, decision remanding the case to the regional office. See exhibit 11.

In July, 1998, petitioner filed a Petition for Extraordinary Relief seeking specific relief. That docket number was 98-1383. (The basis of that first petition will not be again addressed in this petition other than referencing respondent's seemingly deliberate refusal to act.) One remedy requested was for this court to compel respondent to comply with remand instructions by obtaining and diagnosing tissue samples from petitioner. See exhibit 15.

On December 30, 1998, in that previous mandamus proceeding, respondent filed a "Response to the court order dated December 8, 1998", which included on the response's second page, the following assertion:

> "...the Petitioner underwent a fine needle aspirate of the left knee lesion on November 10, 1998. **The report indicates that the tissue sample would be forwarded to the Nashville VA Regional Office (RO) so that**

> **it could be referred to the Armed Forces Institute of Pathology (AFIP).** ***See*** **Exhibit 1...**" (Emphasis supplied)

On the last page of that exhibit 1 to that response the following is noted:

> "...As instructed in the remand, the tissue sample will be forwarded to the Department of Veterans Affairs Regional Office, 1109th Avenue South, Nashville, Tennessee 37203 to the attention of Kathy Strickland. Routing Symbol 213. **VARO will then refer to the Armed Forces Institute of Pathology for analysis:** Date Transcribed: 11-12-98..." (Emphasis supplied)

See exhibit 16.

Thereafter, this court, on February 11, 1999, ordered:

> "...In the present case, because the December 1998 statement from the VA doctors indicates that the necessary tissue sample has been obtained, the petitioner has failed to demonstrate a clear and indisputable right to the writ...
>
> ...On consideration of the foregoing, it is... ORDERED that the petitioner's request for extraordinary relief is denied..."

See exhibit 17.

Starting on June 10, 1999, and repeatedly thereafter, petitioner requested information of the results of the he needle aspirate of the left knee lesion. See exhibits 18, 19, 20 and 21.

Respondent's initial response dated July 15, 1999, was that petitioner's appeal was before the BVA. A July 21, 1999, response was that petitioner's appeal was before the regional office. See exhibits 22 and 23.

Then, on August 11, 1999, respondent stated:

"...As to your request for information concerning the results of a biopsy taken of the veteran's knee, I am again unable to provide you with the information requested. Based on a review of the veteran's claims folder, it appears that, pursuant to the directions contained in the February 19,1997, Board remand decision, a tissue sample was taken from Mr. Hawkins' left knee on November 30, 1998, at the Nashville, Tennessee, VA Medical Center (VAMC). Thereafter, the tissue sample was sent by the Nashville VAMC to the Nashville RO on December 3, 1998, by way of Federal Express. **That Federal Express package is presently filed in the veteran's claims folder.** Included in that package fbom the VAMC (copies of which are attached to this letter, with the exception of the tissue sample), are several papers, one of which indicates as follows: **"The tissue sample does not have to be analyzed for their purpose." Accordingly, as best as I am able to presently determine, it does not appear that the tissue sample has yet**

> **been medically analyzed or reviewed..."** (Emphasis added)

See exhibit 24.

On September 1, 1999, petitioner responded. See exhibit 25.

On September 29, 1999, the VA informed petitioner (almost comically):

> "...As a result of its review of your claim, the Board of Veterans' Appeals has decided to undertake additional inquiry concerning the medical question involved in your case. The Board has requested an opinion from a medical expert in the Armed Forces Institute of Pathology.
>
> This will cause come delay in the review of your appeal. However, the Board feels that such an opinion is necessary in order to ensure that your claim receives every possible consideration ..."

See exhibit 26.

The fifth BVA decision in April 30, 2001, "regrettably" remanded the case to the regional office. The remand instructions called for verification and gathering of information that respondent has had for almost a decade. It is ironic that Bettina S. Callaway, once again, ordered this same case remanded as she did seven (7) years previously. See exhibit 12.

(3) Reason petition should be granted

a. Over one decade to not make a decision is not a reasonable time for respondent to determine petitioner's claims.

b. Respondent has ignored the law of this case, *i.e.*, obtain records from Dr. Velado; provide to petitioner copies of "studies" being relied upon by respondent; etc.

c. Letters have been written to respondent for years with no appropriate responses. The letters have been fruitless. At most, the BVA remands petitioner's claim to the regional office instructing them to find information that has already been supplied by petitioner. Additionally, the record shows the regional office **NEVER** searched for enumerated information fiom a doctor who specifically opined petitioners maladies were "100% caused by exposure to agent orange.

See exhibit 27.

Without a decision, this court's appellate role is handcuffed, and petitioner cannot appeal to this court.

d. Respondent has at best made a negligent misrepresentation to this court that has resulted in dismissal of petitioner's previous request for extraordinary relief. Respondent represented to this court that tissue samples would be obtained AND sent to the appropriate research facility for testing. What respondent did was take the samples and deliberately stick the samples in the file and DID NOT send the samples for testing.

Petitioner respectfully alleges that a delay of over a decade to decide his claims indicates he has a clear and indisputable right to an issuance of a writ. Ten years and dozens of letters only followed by repeated remands to an either inept or dilatory regional office indicates that there are inadequate means to obtain the relief sought, *i.e.* a decision of petitioner's claims. Respondent has neglected to in any way follow up on Dr. Velado's opinions on service connected for many years. Please see exhibit 27. The failure to do so evidences intentional delay.

Petitioner also respectfully contends that some remedy also ought to be available to petitioner for respondent's misrepresentation to this court.

Respectfully submitted this 17 day of **July, 2001.**

STATE OF TENNESSEE)
) ss
COUNTY OF KNOX)

Elmer A. Hawkins, petitioner, makes oath that the statements in his foregoing petition are true of his own knowledge, except as to the matters therein stated to be on information and belief, and these matters he believes to be true.

/s/Elmer A. Hawkins
Elmer A. Hawkins

Subscribed and sworn to before me this
16th day of July, 2001
/s/ _____
Notary Public
My Commission expires: 07/05/2004

/s/J. Myers Morton
J. Myers Morton BPR# 013357
Attorney for petitioner

MORTON & MORTON, PLLC
Suite 620, One Centre Square
620 Market Street
Knoxville, TN 37902
(865) 523-2000

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been furnished to the following by placing same in the U. S. Mail, postage prepaid and addressed as follows, and/or via Facsimile:

General Counsel
Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420

Anthony J. Principi
Secretary of Veterans Affairs
U. S. Department of Veterans Affairs
Washington, D.C. 20420

Via Telecopier (202) 273-4876
Confirmation Via U. S. Mail

This 17th day of **July, 2001.**

/s/J. Myers Morton
J. Myers Morton

APPENDIX U

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. _____

ELMER A. HAWKINS, APPELLANT,

v.

JAMES B. PEAKE, M.D., Secretary of Veterans Affairs, APPELLEE.

AFFIDAVIT OF ELMER A. HAWKINS

STATE OF TENNESSEE)
)ss
COUNTY OF KNOX)

Comes the affiant after being duly sworn and says as follows:

1. I am a combat veteran.

2. During 2007, I was examined and had a biopsy surgically removed at the VA hospital in Murfreesboro, Tennessee.

3. While there in Murfieesboro, I requested a copy of the test results of the biopsy so I could turn it over to doctor Bash.

4. Despite my request, no one ever has shared any results of the biopsy with me or my physician.

5. In December, 2007, I drove to Mountain Home VA hospital in Johnson City, Tennessee for extensive VA tests and examinations. Blood was drawn, urine given, scans performed and an E.K.G. performed, among other things.

6. The entire experience was quite disheartening.

7. The examining doctor was Dr. Hamati.

8. I handed Dr. Hamati a copy of Dr. Bash's report which is attached hereto.

9. Dr. Hamati smugly responded by saying "Dr. Bash does not know what we know." She, like everyone else I encountered at the VA hospital, was self righteous.

10. I asked Dr. Hamati what she knows that Dr. Bash does not know and requested copies of all records and results to provide to Dr. Bash for his review.

11. Dr. Hamati refused saying something to the effect "No, you are not allowed to have them."

12. Despite repeated pleas, orally and in writing, to the Veterans Administration, I have not received

any word, advice or records of all the examinations in Mufreesboro and Johnson City.

13. I am having significant and painful medical problems, and I am worried that I need to have Dr. Bash review the results from the VA examinations and tests so I will know what to do.

14. During late 1979 or the early 1980's, I filed a claim for service connected disability arising from exposure to Agent Orange. All my records, including a copy of my filed claim, were destroyed by fire at my home. When I reported this to the VA, I was told by the VA that my original claim had been "lost", and no action was ever taken on my original claim.

15. I subsequently filed a new claim for compensation on or about October 22,1990.

16. Currently, and for the past year, I have developed new and strange medical problems that are causing me great concern. My toenails have become approximately 1 inch thick and deformed. My health is suddenly deteriorating and my general health is deteriorating. Based upon my personal experience with the Veterans Administration's for the past 20 years, I am worried that Dr. Hamati and the Secretary may have discovered further medical problems and are deliberately refusing to share those findings with me and my treating physicians.

17. I have repeatedly requested fiom the Veterans Administration to see a foot doctor and a skin doctor to examine me. The Veterans Administration to date have ignored my requests, have

not even acknowledged my requests and, again, sweep me under the rug. All as ususal for the past 18 years.

18. My claim has been pending for almost 18 years. For that entire time, my claim has, at times, been ignored and swept under the rug. The Veterans Administration has and continues to take pains to avoid complying with its obligations, including making an honest decision.

Further affiant saith not.

/s/Elmer A. Hawkins
Elmer A. Hawkins
Affiant

Subscribed and sworn to before me this
15th day of July, 2008
/s/
Notary Public
My Commission expires: [SEAL]

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been furnished to the following by placing same in the U.S. Mail, postage prepaid and addressed as follows:

Office of the General Counsel (027D)
U.S. Dept. of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420

General Counsel
Department of Veterans Affairs

810 Vermont Avenue, N.W.
Washington, D.C. 20420

James B. Peake, M.D.
Secretary of Veterans Affairs
U. S. Department of Veterans Affairs
Washington, D.C. 20420

Via Telecopier (202) 273-4876
Confirmation Via U. S. Mail

This __ day of July, 2008.

/s/J. Myers Morton
J. Myers Morton